

## THE COHERENCE OF THE FOUR BASIC PRINCIPLES OF CATHOLIC SOCIAL DOCTRINE: AN INTERPRETATION

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### I. INTRODUCTION

#### 1.A. *On Reading the Tradition*

Pius XI (1922-39) is the first pope to speak of social doctrine as a unified body of teachings which develop by way of clarity and application. In *Quadragesimo anno*, Pius said that he inherited a 'doctrine' handed on from the time of Leo XIII.<sup>1</sup> By any measure, it is a prodigious tradition. Beginning in 1878 with the election of Leo, popes have issued more than 250 encyclicals and other teaching letters. About half are related, broadly, to issues of social thought and doctrine.<sup>2</sup>

This new doctrinal specialty is placed within moral theology because, as John Paul II insisted, it must 'reflect on the complex realities of human existence, in society and in the international order, in the light...of the Gospel teaching on man and his vocation'.<sup>3</sup> Moral philosophy and theology overlap insofar as they study the right ordering of human action to ends. Social doctrine is particularly interested in the social virtues of charity and justice by which the person is right with God and neighbor. But being right with

<sup>1</sup> Pius XI, *Quadragesimo anno* (15 May 1931) §§18-21, ASS 23, 182-84.

<sup>2</sup> Only the *litterae encyclicae* and the *epistolae encyclicae* are encyclicals in the strict sense of the term. I use the expression 'encyclicals and other teaching letters' to cover more inclusively other species of papal documents containing ordinary magisterial teaching. My enumeration follows the *Enchiridion delle Encicliche*, Vol. 3, Edizione bilingue (EDB, Edizioni Dehoniane Bologna, 1997).

<sup>3</sup> *Sollicitudo rei socialis* (30 Dec. 1987) §41, AAS 80 (1988), p. 570; see also, *Centesimus annus* (1 May 1991) § 54, AAS 83, 859-60.

God and neighbor includes membership in societies which need to be rightly ordered both within and without. Even those actions which modern ethicists take to be self-regarding – actions properly undertaken for one's own good – are nonetheless orderable to a community. In this sense we can speak of being right not merely with one's neighbors as singular persons, but also being rightly ordered to (and within) a community.<sup>4</sup>

Although social doctrine has a specifically theological orientation, it makes use of philosophical instruments. If one reads *Mystici corporis* (1943), Pius XII's encyclical on the nature of the Church, alongside the three great 'social' encyclicals – *Rerum novarum* (1891), *Quadragesimo anno* (1931), and *Centesimus annus* (1991) – it is apparent that the ensemble of teachings share a common stock of principles on such things as the human person, the different forms of solidarity, subsidiarity, and the common good. The reader who tries to distill the purely theological elements of social doctrine while leaving behind the philosophical instruments will understand something of the magisterial tradition, but not very much.

The project is also complex because of the subject matter. It is one thing to understand the principles drawn from theology and philosophy. It is quite another thing to understand concrete social realities. In his Christmas Message of 1955, Pius XII pointed out that although the principles of social order are natural, the social realities 'change over time with social developments'.<sup>5</sup> Some changes are brought about by historical forces which cannot be attributed directly to anyone's decision or policy. Other developments arise from within societies, as their members make mutual adjustments to one another and thereby bring about new ways of molding and forming the order of their common goods. Families, associations, markets, political constitutions, and the law of nations are dynamic. They respond both to external forces and to internal actions of their members. Accordingly, social doctrine also must make use of the social sciences.

<sup>4</sup> See for example Aquinas in S.t. I-II, 21.3 ad 1. In answer to the objection that 'good or evil actions are not all related to another person, for some are related to the person of the agent', Thomas replies: 'A man's good or evil actions, although not ordained to the good or evil of another individual, are nevertheless ordained to the good or evil of another, i.e. the community'. A social entity is something that can be harmed in the moral sense of the term, and it therefore falls within the domain of justice.

<sup>5</sup> 'Un ordine naturale, anche se le sue forme mutano con gli sviluppi storici e sociali'. Pius XII, *Col cuore aperto* (24 Dec. 1955). <[vatican.va/holy\\_father/pius\\_xii/speeches/1955/documents/hf\\_p-xii\\_spe\\_19551224\\_cuore-aperto\\_it.html](http://vatican.va/holy_father/pius_xii/speeches/1955/documents/hf_p-xii_spe_19551224_cuore-aperto_it.html)>

Whereas in doctrinal theology proper, the revealed data are unfolded with more clarity and richness gradually, as the Church reflects upon the deposit of faith, in social doctrine the teachings include applications of principles to the contingencies of societies.<sup>6</sup> This makes social doctrine very interesting. By the same token, it can be distorted through ideologies, political policies and various kinds of jargon used by political parties.

Finally, the project is complex because all three factors – the theological, philosophical, and social scientific – are given different emphasis over the course of decades since 1878. The tradition is not only multi-disciplinary, but internally multi-faceted as one pope introduces new themes even while circling back upon the work of his predecessors. It is the Roman way to introduce new considerations while at the same time tightening their connection to the preceding tradition. Old things are made to look new, and new things look old. John Paul II referred to the scribe trained for the kingdom, who is compared to ‘a householder who brings out of his treasure what is new and what is old’ (*Mt.* 13:52). This is not mere pious sentimentality. The Pope meant it as a hermeneutical principle suitable for reading the tradition of social doctrine. Someone who reads the magisterial documents as bits of ‘news’ or as ad hoc pieces of Church policy on a particular social issues will understand something, but not very much.

### 1.B. *An Approach to the Four Principles: Human dignity, solidarity, subsidiarity, and common good*

For centuries, Catholics used the term *doctrina civilis* – or teaching(s) about political order. The chief virtue of justice, holding sway over all other species of justice was called *iustitia legalis*, legal or general justice, which took its name from what is most characteristic of polity, the ordering of law. After the pontificate of Leo XIII (1878-1903), *doctrina civilis* became *doctrina socialis*; for its part, *iustitia legalis* became *iustitia socialis*.

Why did the term ‘social’ come to the fore in Catholic teaching and thought? In order to answer this question, it is necessary to consider the four basic principles which orient the proceedings of this Academy: digni-

<sup>6</sup> Consider, for example, the way in which John Paul II gives an ‘interpretive re-reading [*relegantur*]’ of *Rerum novarum*. At the outset, he contends that it is necessary ‘to look back [*respectandum*], to look around [*circumspectandum*], and to look ahead [*futura inspectanda*]’. CA §3, AAS 794-95.

ty of the person, solidarity, subsidiarity, and common good. Notice that, while all four principles presuppose the human person, the last three are specifically and irreducibly social. The dignity of the human person cannot be interpreted on the premise of methodological individualism – namely, that social unities and relations among members can be reduced to nonsocial properties of members or composites thereof. Indeed, whether there are real social entities instantiating real social relations amongst their members is the first and most abiding question.

I will proceed in this fashion.

First, I will explore a few ontological principles which will help us to understand why two or more persons constitute a society. This effort is best accomplished by asking three questions. What makes a social union different than the unity of a substance? What makes a social union different than an aggregation of individuals? What makes a social union different than partnerships which organize private shares? We need a reasonably clear, but also flexible, account of social entities before we tackle the principle of subsidiarity.

Second, I will explore the difference between devolution and subsidiarity. Terms like solidarity, subsidiarity, and devolution have a history. They are used variously by political parties, labor unions, constitutional lawyers, and political theorists. Moreover, they run the gamut from the political-left to the political-right. I shall put these phenomena to one side. Rather, I want to show why solidarity, subsidiarity, and common good depend upon what we mean by a society. Then, and only then, can we ask the question whether plural societies, each with its own distinctive common good, can enjoy a common good that transcends the particular social unions without injustice to or destruction of those groups?

Finally, I will offer some brief reflections on the problem of applying the principles to contemporary societies.

## II. GROUP PERSONS

### 2.A. *Basic Social Ontology*

Margaret Thatcher famously said that there is ‘no such thing as society’, there are only ‘individual men and women, and there are families’. Lady Thatcher was surely right that groups like families and polities, clubs, teams and colleges do not possess the unity of an individual substance. The

two creation myths of *Genesis*, for example, clearly distinguish between the one-flesh unity of Adam and Eve (*Gen.* 2.21-25) and the antecedent sequence of natural kinds. Sacred Scripture seems to confirm common sense and untutored observation. Marriage does not have a nature in the same sense as a plant, a bird, or even a human being. When two or more people are constituted in a society, there is not produced a second or third natural kind.

In answer to the question, what is a social entity, the lawyers (civil and canonical) as well as the political philosophers have said that society is a 'person'. We can recall Aquinas's definition of a person as that which is 'distinct by reason of dignity':

For as famous men were represented in comedies and tragedies, the name 'person' was given to signify those who held high dignity...And because subsistence in a rational nature is of high dignity, therefore every individual of the rational nature is called a 'person'. Now the dignity of the divine nature excels every other dignity; and thus the name 'person' pre-eminently belongs to God.<sup>7</sup>

Thomas refers to the Latin word *persona*, a mask used to actors to impersonate a well known character – someone distinct in dignity. In Republican Rome, when a family attained the office of praetor (vice military commanders and judges of the standing courts), it achieved the rank of nobility and was entitled to keep the wax masks of ancestors for family worship and funerals (*ius imaginum* was the right to publicly impersonate those who are distinct in dignity). Roman jurists transferred the right of impersonation to the legal status of person. Person now means the capacity to be effective in eyes of the law. Playing a certain role for a specific purpose in a legal drama, he becomes something more than a natural person. Only later did theologians and philosophers transfer the idea of impersonation and the person at law to a rational, individual substance – to the very thing personated; to persons, both human and divine.<sup>8</sup>

While lawyers have always been most interested in how to construct and assign the legal 'mask', philosophers and theologians have never ceased

<sup>7</sup> S.t. I, 29.3 ad 2.

<sup>8</sup> The progression from impersonation to persons is traced by Marcel Mauss, the nephew of Emile Durkheim. 'A Category of the Human Mind: the notion of person; the notion of self', in *The category of the person: Anthropology, philosophy, history*, eds. Michael Carrithers, Steven Collins, Steven Lukes (Cambridge: Cambridge University Press, 1985). See also, Otto von Guericke, *Associations and Law*, *infra* note 41.

asking the question, what stands behind the masks? Is legal personhood nothing but the mask, or are the masks somehow attributes of real persons? And who are these real persons? Why should they need masks at all?

The short answer can be put as follows. All natural persons need legal masks because they assist the public manifestation and efficacy of natural capacities. The owner of a vineyard, and a son who stands to inherit the father's vineyard, will find the legal masks very convenient. The status or standing to conduct business at law requires the same natural person to be different persons – as son, as legatee, as citizen, and so forth. As for who are the real persons, they are individuals of a rational nature who are also members of societies that constitute something more than the sum of their members.

Thomas notes in his treatise on justice in the *Summa theologiae* that justice regards actions, and actions belong to 'supposites and totalities' (II-II 58.2), to natural persons and to groups. In sum, justice concerns individual persons, and then, from a different point of view, individual persons as members of a unity of order that transcends the sum of the parts. There are many Latin names for such an entity – *societas*, *persona moralis*, *corpus ex distantibus*, *collegium*, *universitas*, *communitas* – but for our purposes I will use the more familiar term society.

In the tradition common to jurists, philosophers, and theologians, the word 'person' denotes whoever and whatever is a locus of rights and responsibilities. In this respect, there were at least three kinds of persons. *First*, there are natural persons. Here, the word 'natural' is used to denote whoever possesses a unity of rational substance: human persons, angelic persons, or divine persons sharing the unity of a single substance. *Second*, there are *fictional persons*. As Thomas Hobbes said, '[t]here are few things that are incapable of being represented by fiction'.<sup>9</sup> Inanimate things like bridges, hospitals, and houses can receive endowments, and thus bear interests and rights at law. Like Caligula's horse, made a Senator by imperial decree, such entities are distinct in dignity not on account of their own nature, virtue, or power, but rather by a *fictio legis*, the construction of law. For a fictional person, there is nothing other than the legally assigned 'mask'. *Third*, there are what should be called *group persons*, entities having neither the unity of a substance, nor a unity merely imposed upon things in the fashion of a legal or mental fiction.

<sup>9</sup> Thomas Hobbes, *Leviathan*, XVI.

Such persons – real but neither substantial nor fictional – are called societies. A society possesses what Thomas called a unity of order:

It must be known that the whole which the political group or the family constitutes has only a unity of order [*habet solam ordinis unitatem*], for it is not something absolutely one. A part of this whole, therefore, can have an operation that is not the operation of the whole, as a soldier in an army has activity that does not belong to the whole army. However, this whole does have an operation that is not proper to its parts but to the whole...<sup>10</sup>

This category, *unitas ordinis*, is taken from Aristotle and Thomas, and was revived by Pope Leo XIII and his philosophical colleagues at the Roman Academy of St. Thomas Aquinas in order to avoid the extremes of 19th century social thought. One extreme depicts society as a kind of super-individual having a single mind or a single body like a biological organism. The other extreme is to think of a society as a purely accidental unity ensuing upon the choices and actions of individuals who follow their own preferences. In this case, the ideal model was a market rather than an organism. Leo and his associates saw that a proper understanding of social entities required a middle course.

Catholic social doctrine began to take shape at the same time that sociology emerged as an academic discipline. When Leo was elected in 1878, he knew relatively little of this fledgling discipline, except perhaps the extreme positions of Compté and Marx.<sup>11</sup> But Leo and his advisors were

<sup>10</sup> In Eth. I.5. 'The collective noun implies a plurality of subjects in some kind of unity' (S.t. I, 31.1 ad 2). While only individuals subsist in their own right, society exists in its members by way of order. The order is what substitutes for 'form' in a natural unity.

'Now, one way in which one comes from many is the way of order alone; so from many homes a city comes to be, or from many soldiers an army. Another way is that of order and composition; so a house comes to be when they join together its parts and its walls. But neither of these two ways fits the constitution of one nature from a plurality. For things whose form is order or juxtaposition are not natural things. The result is that their unity cannot be called a unity of nature' (Scg IV.35).

Therefore, a society is neither a natural unity nor a mere compositional unity, but rather is *unum per ordinationem*. The unity is characterized as the order itself – *est ordo ipsius*. It is both common end and shared structure.

<sup>11</sup> For centuries, a de facto social pluralism was taken for granted. But now that society itself was the thing under dispute, how should the Church speak? In retrospect, we might wonder why the Church did not begin a serious discourse with social scientists, some of whom worried about the problem of social disintegration. In brief, the answer is

certainly more than amateurs in law (canonical and civil) and philosophy. Naturally, they reached for a category that was readily available within the orbit of their familiar disciplines. From the New Testament, they were more than a little familiar with the principle of *koinonia*, which is fundamental to ecclesiology and moral theology. From the law they understood the rubric of a group-person, and from philosophy they understood the Aristotelian and scholastic rubric of a unity of order. They chose wisely, because two notions allowed them to develop an analytical framework that was, at once, both sturdy and supple. They took the ancient legal rubric of a *persona moralis* to designate a group having sufficient unity to be a right and duty bearing entity at law; and then they grafted it on to a realistic social ontology of a unity of order that is not reducible either to a natural substance or to a mere aggregate of individuals. Hence, in document after doc-

twofold. First, the Roman authorities did not know very much about this emergent science. Second, what they did know seemed forbidding. I have carefully combed-through the major teaching documents of the 19th century, and the thinkers typically mentioned are Fourier, Saint-Simon, Rousseau, Marx, and various species of Liberalism, usually without identifying names of particular thinkers. These were called physiocrats in the late 18th and early 19th centuries, and naturalists at the end of the century. They advocated a social science, to use Henri de Saint-Simon's phrase, that reduced social phenomena to the 'physics of organized bodies'. Concretely existing social institutions were a false consciousness to be reformed by science. See Georg G. Iggers, 'Further Remarks about Early Uses of the Term "Social Science"', *Journal of the History of Ideas*, Vol. 20, No. 3 (June-Sept., 1959), 433-436. This is why, even as late as the pontificate of Pius XI, who really was interested in demographics and economics, the magisterial documents refuse to utter the two words 'social science'. Instead, they used circumlocutions, such as *periti in re socialis* – experts in social matters; sometimes with the additional word *disciplina*, to indicate that there are certain methods appropriate to that work. Indeed, it was not until the Vatican II era, and especially during the pontificate of JPII, that the social sciences are acknowledged. In early 19th century, Catholic thinkers like Joseph de Maistre and Louis de Bonald adumbrated a social science. See Robert Spaemann, *Der Ursprung der Soziologie aus dem Geist der Restauration. Studien über L.G.A. de Bonald*. Munich: Kösel, 1959. This politically reactionary, though brilliant first-stirrings of social thought had little purchase in the documents of the Roman magisterium. Leo XIII wished to develop a social teaching grounded in philosophy, chiefly that of Thomas Aquinas. In doing so, he wanted to keep the foundations relatively clean of anything that sailed too close to the shores of reactionary politics. For this part of the story, see my essay: 'Two Modernisms, Two Thomisms: Reflections on the Centenary of Pius X's Letter Against the Modernists', in *Nova et Vetera* (American edition), Vol. 5, No. 4 (Fall 2007), 843-879. On Leo's suspicion of Romantic reactionaries, see my essay: 'Pope Leo XIII (1878-1903)', in *The Teachings of Modern Roman Catholicism: On Law, Politics, & Human Nature*, Eds. John Witte and Frank Alexander, with Introduction by Russell Hittinger (New York: Columbia Univ. Press, 2007), 39-105.



ument, from the time of Leo onward, we find the phrase 'true society'. This relatively simple matrix served both descriptive and normative purposes. Once we have a way to pick out what counts as a 'true society', then we can put in place a scheme of rights and responsibilities, depending on the various ends and modes of unity of particular societies.

In a unity of order each member possesses what is individually proper to himself – namely, certain operations and acts not reducible to the commonality, and not dissolved or cancelled by membership in a group. At the same time, a society enjoys a real unity transcending mere aggregation of the members.<sup>12</sup> Unity of order is not an ideal model imposed upon social data. Rather, it only brings into view facts available to common sense: that the individuals in a queue are parts not members of the queue, and they are the members not the parts of St. Rita's parish. The first is an aggregation, the second a unity of order. In the parlance of merological set theory (the logic of parts and wholes), a group is a non-extensional set because it does not necessarily change its identity whenever the constituent bits or pieces change. For France, or the Catholic Church, or the local labor union, change of constituents can *sustain* rather than *destroy* the identity of the group. In an extensional set, however, the addition or subtraction of one constituent changes the identity of the set. With one exception, this certainly is not true of a social entity.<sup>13</sup> Ordinarily, the law will assume the perpetuity of a society for the good reason that it does not have the mortality of a natural substance.

Wherever there are plural rational agents, aiming at common ends, through united action, *and where the unity is one of the intrinsic goods aimed at*, we have a society – something distinct in dignity. To use once again the traditional terminology, the group is said to have an extrinsic common good (victory for the army) and an intrinsic common good (the

<sup>12</sup> See David-Hillel Ruben. 'Social Wholes and Parts'. *Mind*, New Series, Vol. 92, No. 366 (April 1983), 234-238. For aggregative or 'extensional' sets  $A=B$  if A and B are just the same bits or constituents. See also his, 'The Existence of Social Entities', *The Philosophical Quarterly*, Vol. 32, No. 129 (Oct. 1982), 301.

<sup>13</sup> Marriage is different, of course, because the union of the two particular persons is more immediately the 'common' good. Therefore, marriage really does change with the death or dismissal of a spouse. Polygamy, for example, does not imply a marriage that becomes, by increments, larger with every new spouse. Marriage, however, is ordered to family, and families can persist over time with the inclusion of a new member.

common order of its action).<sup>14</sup> Groups differ in terms of the ends and the structure of their respective, internal unity. A faculty, for example, aims to advance learning and to educate students, but, unlike a marriage, its intrinsic unity does not depend upon conjugal relations. Traditionally, a matrimonial society has only one form, a man and a woman, who share life unto perpetuity, as a whole, through a one-flesh act of sexual unity.<sup>15</sup> For its part, a polity can have plural forms – rule by one, by a few, by many, or a mixed form. It can consist of different proportions of men, women, and children. Societies are quite different in their ends and modes of unity.

But any society has this much in common. It possesses an intrinsic common good, which cannot be distributed or cashed-out. The common good never exists as a private good, and therefore when someone exits a marriage or a polity he cannot take away his private share. Even in our confused legal cultures, courts understand perfectly well that they can divide and distribute the external properties, but not the marriage itself. The matrimonial society, therefore, is not redistributed so much as dissolved or annulled.

A group will hold itself out to the rest of the world as something distinct in dignity,<sup>16</sup> possessing rights and responsibilities.<sup>17</sup> Not *as though* they are

<sup>14</sup> In any integral whole like a society, common order is the form, analogous to a substantial form that unifies a natural thing. The extrinsic good of the army is the victory. *In XII Meta., lect. 12, n. 2627*; and *In I Sent. D. 44, q. 1, a. 2*. Gregory Froelich, 'The Equivocal Status of *Bonum Commune*', in *The New Scholasticism* 63 (Winter) 1989, 38-57.

<sup>15</sup> As Pius XI emphasized, marriage is not just a partnership to bring about certain ends, but is rather a mode of union by which such ends are achieved. 'This mutual molding [*interior conformatio*] of husband and wife, this determined effort to perfect each other, can in a very real sense, as the Roman Catechism teaches, be said to be the chief reason and purpose of matrimony, provided matrimony be looked at not in the restricted sense as instituted for the proper conception and education of the child, but more widely as the blending of life as a whole [*totius vitae communio*] and the mutual interchange and sharing thereof'. *Casti connubii* (31 Dec. 1930), §24, AAS 22, 548f.

<sup>16</sup> Take, for example, the American *Declaration of Independence*: 'We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies solemnly publish and declare, That these United Colonies are, and of right ought to be, *Free and Independent States*'.

<sup>17</sup> The ontology we are developing here is evident in Pius XII's *Mystici corporis* (29 June 1943). At the outset, Pius argues that the Church is a true society, which is to say that it is something more than a commutation of private things by consent of the parties (§9). Like any society, the Church is a unity of order that transcends aggregation of the members, while at the same time preserving the dignity of what is proper to the parts: 'In a nat-

one, but rather *as one*. In this sense, a society is called a *persona moralis*, a *corpus moralis*, a *unitas collectiva*, or even a *corpus mysticum*.<sup>18</sup> The word ‘moral’ denotes a unity of action among plural agents, in contradistinction to the term ‘physical’ which denotes a substantial unity. Social entities might be spatially locatable (e.g. France, or one’s parish, or college), but their unity transcends material aggregation. The same natural persons at once can be members of France, a parish, and a college without confusion, though not always without rivalries and tensions of loyalty.

Thus, the scriptural hexaemeron crowns the six days of creation not with another natural kind, much less with an aggregation of material forces, but with a society. In Jewish and Christian allegorical exegesis, this society was,

ural body the principle of unity unites the parts in such a manner that each lacks its own individual subsistence; on the contrary, in the Mystical Body the mutual union, though intrinsic, links the members by a bond which leaves to each the complete enjoyment of his own personality [*Dum enim in naturali corpore unitatis principium ita partes iungit, ut propria, quam vocant, subsistentia singulae prorsus careant; contra in mystico Corpore mutuae coniunctionis vis, etiamsi intima, membra ita inter se copulat, ut singula omnino fruuntur persona propria*]. Moreover, if we examine the relations existing between the several members and the whole body, in every physical, living body, all the different members are ultimately destined to the good of the whole alone [*unice destinantur*]; while if we look to its ultimate usefulness, every moral association of men [*dum socialis quaelibet hominum compages, si modo ultimum utilitatis finem inspicimus, ad omnium et uniuscuiusque membri profectum, utpote personae sunt, postremum ordinantur*] is in the end directed to the advancement of all in general and of each single member in particular; for they are persons’. (§61), AAS 35 (1943), 221.

See his analogies between various species of societies, differing according to their respective ends and modes of unity (§§63-68), *Ibid.* 223-227.

<sup>18</sup> The term ‘mystical’ does not necessarily refer to supernatural things, but rather designates a society – namely, a person distinct in dignity, but distinguished from a person whose dignity consists in the unity of substance. The transition of usage from the strictly theological to political and juridical contexts has been well studied: in the 1930s and 1940s by Henri de Lubac, S.J., *Corpus Mysticum*, Trans. Gemma Simmonds CJ, with Richard Price and Christopher Stephens (Notre Dame: Univ. of Notre Dame Press, 2006); and more recently by Francis Oakley, ‘Natural Law, the Corpus Mysticum, and Consent in Conciliar Thought from John of Paris to Matthias Ugonius’, *Speculum*, Vol. 56, No. 4 (Oct. 1981), 786-810, and by Hélène Merlin and Allison Tait, ‘Fables of the “Mystical Body” in Seventeenth-Century France’, *Yale French Studies*, No. 86, Corps Mystique, Corps Sacre: Textual Transfigurations of the Body from the Middle Ages to the Seventeenth Century (1994), 126-142. The masterworks, however, are by Ernst Kantorowicz: Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957), and ‘Mysteries of State’, *Harvard Theo Rvw*, XLVIII (1955), 65-91, in *Selected Studies* (Locust Valley, NY: J.J. Augustin Publisher, 1965).

in turn, the *type* of another society – Israel or the Church.<sup>19</sup> As Augustine contended in the *Confessions*, creation is for the sake of the Church. For his part, Thomas argued that God declared the unity of order at the sixth day ‘very good’ because he ‘wished to produce His works in likeness to Himself, as far as possible, in order that they might be perfect, and that He might be known through them. Hence, that He might be portrayed in His works, not only according to what He is in Himself, but also according as He acts on others, He laid this natural law on all things, that last things should be reduced and perfected by middle things, and middle things by the first, as Dionysius says.’<sup>20</sup> In other words, we are made unto the image of God not only because the individual person possesses the excellence of a rational nature, but also because we must cause good in others. Virtually all of the modern popes have highlighted this principle for social doctrine. From this twofold imaging of God flows the dignity of the individual and of social order. Notice the two imagings are without rivalry precisely because of the recurring distinction between unity of substance (the rational nature of the human person) and unity of order (a multiplicity of rational beings constituting an order, a ‘true society’).<sup>21</sup> In this twofold imaging, the tradition has also emphasized the unique dignity of the unity of a multiplicity enjoying a common good. Thomas speaks of the created unity of order as ‘divinity’ (*divinitas*), and, in the case of polity, as being ‘more divine’ (*divinius*) than other imagings, whether individual or collective, because ‘divinity’ signifies ‘the common good which is participated by all’.<sup>22</sup>

<sup>19</sup> On Jewish and Christian readings, see Gary A. Anderson, *The Genesis of Perfection: Adam and Eve in the Jewish and Christian Imagination* (Westminster: John Knox Press, 2003). See, once again, Pius XII, who insists that marriage constitutes a mystical person [*constituere mysticum personam*] (*Mystici corporis*, at §67).

<sup>20</sup> Conf. XI–XIII. On the completion of the hexaemeron as ‘very good’, see also Thomas, Scg II.45, and III.64; S.t. I, 25.6, and 47.1. The diversity of entities is not a succession that amounts to a mere quantitative improvement, but rather a diversity exhibiting a unity of order: Goodness which is simply and uniformly in God exists in creatures in a multiform manner. S.t., Supplement, q. 34.1.

<sup>21</sup> Thus, Thomas speaks of the ‘trace’ (*vestigium*) of the Trinity in creatures: ‘And therefore Augustine says (De Trin. vi 10) that the trace of the Trinity is found in every creature, according “as it is one individual”, and according “as it is formed by a species”, and according as it “has a certain relation of order”’. S.t. I, 45.7.

<sup>22</sup> Here, from *In Rom.* I.6 [concerning verse 20 of the Pauline letter], and DV 5.3. These two terms – *divinitas* and *divinius* – must be distinguished from the term *deitas*, which refers directly to the divine essence. On this theme of the common good as a participational likeness, see Lawrence Dewan, ‘St. Thomas and the Divinity of the Common Good’ [forthcoming].

In his seminal essay on 'Moral Personality and Legal Personality', the British legal historian F.W. Maitland writes:

When a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted...If the law allows men to form permanently organized groups, those groups will be for common opinion right-and-duty bearing units; and if the law-giver will not openly treat them as such, he will misrepresent, or, as the French say, he will 'denature' the facts...For the morality of common sense the group is a person, is right-and-duty-bearing unity.<sup>23</sup>

When individuals, with a note of permanence,<sup>24</sup> engage in united action for a common purpose, there comes into existence a unity that transcends the aggregation of its parts. That is to say, there comes into existence a group-person (a society) that requires the rest of us to recognize not only the individuals, but, as Maitland puts it, ' $n + 1$  persons'.<sup>25</sup> It would 'de-nature' the facts, Maitland says, to pretend otherwise.<sup>26</sup> Every society will depend upon individual persons. This is just what Aristotle and Thomas meant by a unity of order, inasmuch as the members are not reducible to the whole as accidents to an underlying substance. *Groups are not ontologically basic in the order of substances*. They are basic, however, in constituting a unity that excels parts (members) which are also wholes (natural persons).

What Maitland calls ' $n + 1$ ' persons means that the group or society, and not just its individual members, should morally count as an agent or

<sup>23</sup> F.W. Maitland, 'Moral Personality and Legal Personality', in *State, Trust and Corporation*, edited by David Runciman (Cambridge, 2003), 63, 68. Quoting A.V. Dicey.

<sup>24</sup> Thus, a society is not necessarily formed when two or more agents collaborate to lift a box. To be sure, such collaborations can be the beginning of something more. A society, however, requires the intention of stable order, which itself includes the intrinsic good of common action.

<sup>25</sup> Maitland, p. 69.

<sup>26</sup> On the *genossenschaftliche* character of polity, as a harmony of group-persons, see: Otto von Gierke, *Natural law and the theory of society, 1500-1800: With a lecture on the ideas of natural law and humanity* by Ernst Troeltsch. Translated with an intro. by Ernest Barker. A translation of 5 subsections in v. 4 of Gierke's *Das deutsche Genossenschaftsrecht*. Boston, 1957.

a patient.<sup>27</sup> As the bearer of rights and responsibilities, a society can harm or be harmed in the moral sense of the term. We morally harm a society when we fail to recognize its common good and its agency as an ' $n + 1$ ' person by refusing to give it the proper legal personality or mask. In such cases, we do something more than harm what belongs privately to the individuals; more precisely, we harm what those individuals, as members, hold in common.

Hence, John Paul II's use of the term 'subjectivity of society'. A society is something more than inter-subjectivity. Its inter-subjectivity constitutes a 'subject' in its own right.<sup>28</sup> This distinction between mere inter-subjectivity and a society is drawn from ordinary experience. A number of individuals in a shopping mall certainly evince inter-subjectivity without pretending to constitute a society. Regarding this phenomenon, Hobbes speaks of a 'mere concourse of the people, without union to any particular design by obligation of one to another, but proceeding only from a similitude of wills and inclinations'.<sup>29</sup> Such 'concourse', of individual wills or desires, more or less spontaneously converging upon similar objects, is what we might find in the marketplace of a city. It is not harmed, and is quite likely facilitated, when we refuse it the status of a society or group. Spontaneous orders which emerge from inter-subjectivity are not incompatible with a strong ontology of social entities. Economists favor this notion of *catallaxy* or unplanned order for the good reason that it is empirically verifiable and

<sup>27</sup> For groups as agents and patients in the moral order, see Nicholas Wolterstorff, *Justice, Rights and Wrongs* (forthcoming, Princeton University Press), chapter 18.

<sup>28</sup> *Centesimus annus*, §13. '...the social nature of man is not completely fulfilled in the State, but is realized in various [intermediary] groups, beginning with the family and including economic, social, political and cultural groups which stem from human nature itself and have their own autonomy...This is what I have called the "subjectivity" of society which, together with the subjectivity of the individual, was canceled out by "Real Socialism"'. CA (1 May 1991), AAS 83 (1991), 809-810. Here, he is citing *Solicitudo rei socialis*, §§15, 28 (30 Dec. 1987), AAS 80 (1988), 530, 548. Again, he affirms the dignity of two kinds of persons or subjectivities. See also: "The question arises as to why the biblical writers did not feel the need to address requests for forgiveness to present interlocutors for the sins committed by their fathers, given their strong sense of solidarity in good and evil among the generations (one thinks of the notion of "corporate personality" [*si pensi all'idea della "personalità corporativa"*]). *Memory and Reconciliation* (1999), 2.1.

<sup>29</sup> *Leviathan*, XXII. Accomplished more perfectly by animals, e.g. by swarms. *De Cive* 5.5. So, on Hobbesian grounds, we must distinguish (a) peoples united in action, (b) people transitorily touching upon the same object, (c) unified swarms. Only the first needs the *consensus iuris* of the sovereign. *De Cive* 5.4.

useful for explaining market relations. It is problematical only when used to explain the entirety of social relations.<sup>30</sup>

Aristotle famously said that man is naturally a political animal, for men 'make common' words, judgments, and deeds.<sup>31</sup> To be sure, not everything can be put in common, for that would be totalitarian. And not everything that is made common can be done so in exactly the same way. Families, voluntary associations, the Church, and the state make different things common in different ways. The Aristotelian-Thomist ontology of unity of order is meant as a point of departure for empirical and moral investigation. It allows us to begin correctly, by not confusing social unity with the unity of a natural organism, a mere compositional unity, or a pattern of inter-subjectivity.

In making things common, societies are to be distinguished not only from what Hobbes called a *concourse* of wills, but also from a more *specific agreement* of wills typical of a partnership. In a partnership, two or more people deliberately and explicitly make a contract with respect to mutually agreeable ends while laying claim to their private shares and yields. Admittedly, this distinction between a partnership and a society is tricky when we examine concrete facts. For one thing, partnerships can become societies, and societies can devolve into mere partnerships – a phenomenon that is familiar to anyone who observes the life of families in an American suburb.<sup>32</sup>

<sup>30</sup> In this sphere of spontaneous adjustments and exchanges, we might think of Friedrich Hayek's notion of *catalaxy*. See *The Mirage of Social Justice*, 107-109. Nothing in our account of the social ontology of groups denies the existence or importance of catalactic order – an order that ensues upon agents pursuing diverse ends. As Hayek contends, the model of spontaneous, catalactic order, pertains especially to a market 'through people acting within the rules of the law of property, tort, and contract' (p. 109). However, Hayek expands the model to include the broader society in which such market relations take place. He brusquely dismisses the importance of group persons.

<sup>31</sup> Aristotle, *Ethics* 122611-12.

<sup>32</sup> Thomas sometimes speaks generically of any kind of unity toward an end, even when the reciprocal actions are only minimally societal, in the sense we've put on that term. 'A joining denotes a kind of uniting, and so wherever things are united there must be a joining. Now things directed to one purpose are said to be united in their direction thereto [*Ea autem quae ordinantur ad aliquid unum, dicuntur in ordine ad illud adunari*], thus many men are united in following one military calling or in pursuing one business, in relation to which they are called fellow-soldiers or business partners [*vel socii negotiationis*']. In *Sent.*, Lib. IV, d. XXVII q. 1, a. 1. The term *socii*, corresponds roughly to what we would call partners or allies. Whenever there is a common end, there will be some kind of 'joining' of action. Here, however, Thomas seems to mean by businessmen, something akin to what we mean by partners.

Both can be brought into existence through the instrument of a contract. And to make our descriptive ontology all the more complicated, in a commercial society like ours we often speak of societies as partnerships even when we mean something more than that. Moreover, the law is often prepared to treat group-persons rather generically.<sup>33</sup>

Let us return now to the distinction between a partnership and a society. In mere partnership, the work is traceable to the individual partners but not to the partnership itself.<sup>34</sup> One who supplies Honda with auto parts does not intend to bring into being a society. No corporate personality is aimed at. The reciprocity has no aspect of permanence; it has no united action; indeed, it requires no society whatsoever – except incidentally, perhaps, in the breach of contract, in which case the partners repair to the courts of the political society. ‘Mere partnership’, Yves Simon observes, ‘does not do anything to put an end to the solitude of the partners’.<sup>35</sup> In our example, it is sufficient that one delivers the parts, that Honda assemble the cars, and that various individuals write monthly checks for leasing the equipment. Therefore, a partnership corresponds more or less to what used to be called a *universitas rerum*, an organization of things. Each partner contributes and is entitled to yield for his private benefit precisely the parts which belong to him.<sup>36</sup> To be sure, there can be no such organization with-

<sup>33</sup> It is worth considering Frederick Hallis’s point: ‘As we have emphasized on more than one occasion, collectivities do not all require the same treatment. They present an infinite variety in respect of their internal solidarity and the importance of their purposes. It would be idle to maintain that some of these cannot be treated adequately without the conception of corporate personality. All that we maintain is that in some cases this conception becomes indispensable. Without pretending to draw the exact line in this matter, it is sufficient for the moment to say that the conception of corporate personality is essential in cases where the collectivity in question possesses a certain degree of solidarity and permanence’. Frederick Hallis, *Corporate Personality: A Study in Jurisprudence* (Oxford: Oxford Univ Press, 1930), 100-101.

<sup>34</sup> Yves Simon writes: ‘In a mere partnership each action is traceable to some partner, e.g., all the work is traceable to the handicraftsman and all the financing to the money-lender, [but] none is traceable to the partnership itself. *Philosophy of Democratic Government*, Chicago 1951, p. 64.

<sup>35</sup> *Id.*

<sup>36</sup> Pius XII said that it would be wrong to think ‘that every particular enterprise’ is a genuine ‘society of persons’. Speech to U.N.I.A.P.A.C. (7 May 1949), AAS 41, p. 285. He seemed to have in mind what we have called *partnerships* which remain strictly at the level of commutative justice. Each part contributes and extracts its private portion of the whole. There is no intrinsic common good distinctive of a society or a communion of per-



out real persons doing their part; the essential point is that it is not the persons but rather the things which are collected.

In the order of justice, we harm a partnership when we prevent the partners from contributing and extracting what it privately their own. It depends principally on what has been called 'commutative' justice. In a society, on the other hand (what the canonists call a *universitas personarum*) the individuals are not parts or partners so much as members who enjoy the common order in the manner of usufructories; each is entitled to enjoy what is com-

sons. Pius was concerned that strict commutative justice, such as workers contracting a just wage, is not always the same as a just distribution within a genuine social whole. The just wage in commutation is sacrificed to a cost-benefit calculus of distribution even though there is no proper whole as a context for the distribution. The justice of partnerships in modern 'enterprises' is a very tricky problem for just this reason. Does this partnership, which undoubtedly comes under the justice of commutation, also contain aspects of society (beyond mere inter-subjectivity)? Pius XII reckoned that the business enterprise should be organized not only by the instrumental good of efficiency, but 'also and above all by giving it the value of a true community' (Speech to A.C.L.I. [11 March 1945] AAS 37, p. 71). The problem of how to characterize the limited partnerships, or *sociétés anonymes*, goes back to the Leonine era. The various philosophies and policies of what was called 'corporativism' had the ideal of transforming limited companies into the 'moral persons' of true societies or associations. For example, the very influential Fribourg Union, which consisted of an international group of Catholic social thinkers, proposed in 1891 that those who invest in an enterprise as anonymous partners ought to receive a reasonable return on their investment after a few years, at which time the company should pass into hands of the members of an organic association. This ideal inevitably ran into problems with the scale and complexity of modern corporations. For a thorough study of the *régime corporatif* developed by the Fribourg Union, and its interaction with the evolution of Catholic social doctrine in the late 19th century, see: Normand Joseph Paulhus, *The Theological and Political Ideals of the Fribourg Union*, Ph.D. diss. at Boston College (1983).

Pius XI taught that the economy is part of a complex unity of order which includes various kinds of partnerships and societies. But he certainly emphasized the crucial role of self-governing societies:

'But complete cure will not come until this opposition has been abolished and well-ordered members of the social body [*socialis corporis*] – Industries and Professions – are constituted in which men may have their place, not according to the position each has in the labor market but according to the respective social functions which each performs. For under nature's guidance it comes to pass that just as those who are joined together by nearness of habitation establish towns, so those who follow the same industry or profession – whether in the economic or other field [*sive oeconomica est sive alterius generis*] – form guilds or associations [*collegia seu corpora*], so that many are wont to consider these self-governing organizations [*haec consortia iure proprio utentia a multis*], if not essential, at least natural to civil society [*sin minus essentialia societati civili, at saltem naturalia dici consueverint*]. *Quadragesimo anno*, §83, AAS 23 (1931), p. 204. [Note that in the next para-

mon, but not as his or her private part.<sup>37</sup> Importantly, a common good is not opposed to the individual good, but rather to the private good. A partnership is not opposed to private good – indeed, the whole point is to organize private goods (pooling resources) to enhance the private yield. There is nothing inherently suspect about partnerships; in fact, they are as ancient as society itself. But they shouldn't be confused with societies.

Again, let us take the example of a queue in front of a credit union: the individuals are *parts* of the queue, *partners* in the credit union, and perhaps *members* of St. Rita's parish. It is only the latter about for we use the word 'society' in something more than a metaphorical sense.

A society does not just aim at a common objective, but intends to have it brought about by united action. Think, for example, of a family, a faculty, a crew-team, or an orchestra. In each case, the reason for action includes the good of common action. Achievement of a mutually-agreeable result is not enough. To be sure, an orchestra aims to produce the music, just as a

graph (p. 205) Pius goes on to expound Thomas's notion of unity of order in which the order itself counts as the form of unity].

In *Centesimus annus*, John Paul II appears to take a slightly different approach. Rather than attempting to distinguish which enterprises are societies or mere partnerships, he emphasizes the nature of human action, and how it will naturally expand into various relations of solidarity: 'By means of his work a person commits himself, not only for his own sake but also for others and with others. Each person collaborates in the work of others and for their good. One works in order to provide for the needs of one's family, one's community, one's nation, and ultimately all humanity. Moreover, a person collaborates in the work of his fellow employees, as well as in the work of suppliers and in the customers' use of goods, in a progressively expanding chain of solidarity [*instar coniunctionis continuae, quae gradtim se extendit*]. CA §43, AAS 847.

<sup>37</sup> Usufruct, or the right of enjoyment or participation. This important concept is traced out by Heinrich Rommen, *The State in Catholic Thought: A Treatise in Political Philosophy*, 2nd English Edit., Introduction by Russell Hittinger (Alethes Press, 2008), 139. Every societal common good is usufructory inasmuch as the good of the common order cannot be devolved into private hands or dominion. The issue has surfaced especially in marriage. Leo XIII argues that God 'so decreed that man should exercise a sort of royal dominion over beasts and cattle and fish and fowl, but never that men should exercise a like dominion over their fellow men'. In *plurimus* (1888), *Leonis XIII P.M. Acta VIII*, 171f. The human agent does not stand either to his own body or to the body of another as master to instrument. Once dominion is transferred to the human body, the human person encounters the human world as Adam did the animals. *Sapientia christiana*, §12, *Acta X*, 18. Therefore, the conjugal union of husband and wife involves differentiation of function (like any unity of order) but never dominion. It's form consists of an order of unity rather than dominion in property. See *Arcanum divinae* (1880) §7, *Leonis XIII P.M. Acta II*, pp. 13f; and *Casti connubii* (1930), §84; AAS 22, 572f.

crew-team aims to win the race; for their part, spouses aim to raise children and to send them into a wider world of societies. Yet, for each of these groups, their respective corporate unity is one of *reasons for action*. In the case of a society, unity is an intransitive good – ordinarily, it survives the failure of the crew team to win the race, the failure of a marriage to produce children, or a polity to negotiate a treaty with another state. Partnerships usually do *not* survive failure of the partners to secure the mutually agreeable ends for which the arrangement was constructed.

In sum, we will find human sociability manifesting itself in a variety of ways: spontaneous inter-subjectivity, deliberate partnerships, and in authentic societies which have an intrinsic common good. Nevertheless, the order of a society is something more perfect, for it not only has greater unity and durability, but most importantly it has a common good that is intrinsically valuable to each of its members. Thus, Cajetan's dictum: *Mihi sed non propter me* – 'for me, but not for my sake'. As the word 'perfection' implies, something is brought to completion. In the case of a society, we can call it solidarity, friendship, or being rightly ordered to one's neighbor. Once we consider a common good, the moral imperative of being rightly ordered to one's neighbor takes on a new note. For we must take into account not merely just exchange or just distributions, but also consider human actions insofar as they adequately contribute to, and participate in, the social common good.

There are three ways to destroy a society. First, by destruction of its members, or its matter. Second, by disintegration of the aim to achieve common ends through united action. Third, by destroying the instrument of authority that coordinates the common action. Partnerships, on the other hand, are destroyed either by destruction of its parts or by the obsolescence of the extrinsic end of the partnership (the yield, as it were). Both can be destroyed by injustice. But the kind of justice that applies to the one is not exactly the kind of justice that applies to the latter. Later, we will introduce the concept 'social justice' which pertains to the common good – to the order itself commonly participated and enjoyed by members of a society.

## 2.B. Summary

- Societies are unities order which cannot be reduced either to substantial unity nor to a unity of mere aggregation.
- Societies are constituted not only according to common ends, but also by a shared structure or intrinsic common good. The world 'common'

is opposed to 'private', but certainly not to 'individual'. Each member shares the common good of order. Nonetheless, what is common cannot be cashed-out and taken as a private share. One who leaves a club, marriage, church, or polity cannot require the common good to be distributed to him or her. This is what marks the difference between a society and a partnership.

- For a social unity of order, the parts are also wholes (individual persons) which retain their own proper operations. Catholic social doctrine has often repeated Thomas's dictum: 'Man is not ordained to the body politic, according to all that he is and has'.<sup>38</sup> But this principle holds true of any society. Whatever the dignity of a society, it does not supplant, but rather, presupposes the dignity of the individual person.
- Precisely because every society consists of a diversity of members who retain their own proper operations, human persons can be members of plural societies. Husband and wife are members of a municipality, of a nation, of a church. Children are members of the family and members of college or a team. Each of these memberships can be referred once again to a wider society at both the level of the state and the international order. Human sociability is not exhausted in a single membership. The chief goal of social justice is the harmonization of these diverse group-persons.
- Therefore, the *Catechism of the Catholic Church* teaches: 'A *society* is a group of persons bound together organically by a principle of unity that goes beyond each one of them. As an assembly that is at once visible and spiritual, a society endures through time: it gathers up the past and prepares for the future. By means of society, each man is established as an "heir" and receives certain "talents" that enrich his identity and whose fruits he must develop. He rightly owes loyalty to the communities of which he is part and respect to those in authority who have charge of the common good' (CCC §1880).

### III. MODELS OF CIVIL SOCIETY

The diverse set of non-governmental associations called 'civil society' includes economic corporations, trusts, schools and faculties, charitable

<sup>38</sup> *Quod homo non ordinatur ad communitatem politicam secundum se totum, et secundum omnia sua.* S.t. I-II, 21.4 ad 3.

organizations and foundations (both religious and secular), the press, clubs, churches, sodalities, and labor unions. In a free society, these groups will possess juridical personality, their appropriate legal masks. That there be a civil society distinct from the formal organs of the state, and that civil society be recognized at public law, are uncontroversial propositions today. Since the seventeenth-century, however, we have inherited quite different understandings of the nature of civil society and the ontology of group-persons upon which it would seem to depend. I will call one the devolution model and the other the subsidiarity model.

### 3.A. *Devolution Model: Concessions and Fictions*

When we think of modernity we think of the Enlightenment, the sovereignty of reason, and of ideologies of liberty; we think especially of his technologies. But his greatest and most sustained work was the state. Scholars debate exactly what makes a polity a modern 'state', but some criteria will appear on every list: such as territorial homogeneity, monopolies over lethal force, education, police, taxation – and, of course, *sovereignty as indivisible, perpetual and inalienable power*.<sup>39</sup>

Beginning in the 17th century, one of the most urgent questions was how to reconcile the state's monopoly over public authority and power with the myriad of other groups claiming authority, rights, and liberties according to custom, natural law, and ecclesiastical law. How does state sovereignty (which recognizes the state as the pre-eminent, if not the exclusive group-person) comport with what Maitland called the 'right-and-duty bearing' unities that we are calling civil society?<sup>40</sup>

Thomas Hobbes (1588-1679) provided an early, and very clear, model for understanding the relationship between groups and the sovereign state. It has been called the 'concession' theory. The term *concession*, is traced to the Edict of Gaius in the *Digest* 3.4.1, where *collegia* or other social bodies are conceded 'on the pattern of the state'.<sup>41</sup>

<sup>39</sup> To mention only a few covered in Christopher Pierson, *The Modern State* (London: Routledge, 1996), 6-34.

<sup>40</sup> See Thomas's criticism of Plato's idea that the polity is a homogenous order, *Sententia libri Politicorum*, I.1 §1-2, 17-18; and his remarks on natural diversity at II.1, §7-8.

<sup>41</sup> *Digest* 3.4.1 at 137. Note the three important verbs in this dictum: *concedere, permittere, confirmare*. The term 'concession' is emphasized in the magisterial work of Otto Friedrich von Gierke (1841-1921), who attempted to recover the juristic concept of corpo-

In the *Leviathan*, Hobbes contends that a 'person is he whose words or actions are considered either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether truly or by fiction'.<sup>42</sup> In the natural as well as in the legal world, there are three kinds of 'person': (a) natural, individual persons who speak and act for themselves; (b) artificial persons who represent the speech and actions of others; and (c) purely fictional persons, such as bridges, churches, or hospitals. Seeing clearly enough that the state could not count as a natural, individual person, Hobbes concluded that the state is an artificial person, which is to say that the state has a corporate nature by virtue of a multitude being represented. This representative is called the 'sovereign'.

This division of persons and personations brings us to the crucial issue. Into what category do we place non-governmental entities of this sort? Can they be persons? Hobbes writes: 'For power unlimited is absolute sovereignty. And the sovereign, in every commonwealth, is the absolute representative of all the subjects; and therefore no other can be representative of any part of them, but so far forth as he shall give leave'.<sup>43</sup> For Hobbes, once the sovereign comes into existence, there can be only one legitimate artificial or representing-person. Other group-persons may exist only by the permission or *concession* of the sovereign. At least in passing, it is worth noting that concession theory is not a creation of the modern state, but goes back to Roman law. Nor is there anything inherently wrong with the concession model.<sup>44</sup> So

rate personality from what he called the 'concession' theory. For Gierke, it was Hobbes who gave the most challenging version of it in modern times. Otto von Gierke, *Natural law and the theory of society, 1500-1800: With a lecture on the ideas of natural law and humanity* by Ernst Troeltsch. Translated with an introduction by Ernest Barker. See also Otto Gierke, *Associations and Law: The Classical and Early Christian Stages*, Edit. and trans. by George Heiman, with an interpretative introduction to Gierke's thought. Toronto, Univ. Toronto Press 1977.

<sup>42</sup> *Leviathan*, XVI.

<sup>43</sup> *Leviathan*, XXII.

<sup>44</sup> Aspects of 'concession' are well-known in Roman and ecclesiastical law. Associations claiming a share of public authority in the civil or ecclesiastical spheres require permission to so exist. Canon law (CIC 1983), for example, routinely and distinguishes between the *moralis personae* of the Catholic Church and the Holy See (Can. 113 §1), which are instituted by divine ordinance, individual persons or *personae physicae* (Can. 113 §2), and a myriad of other *personae iuridicae* which receive a special status by virtue of their useful purposes and their ability to achieve them (Can. 113 §3). Baptised Catholics, for example, enjoy a right to establish and direct associations which serve a charitable or pious purpose, to hold meetings, and to pursue their purposes by common effort (Can. 215). But they cannot claim the

long as the objectives belong to public authority, the state may rightfully outsource the means to the ends. This is true, as well, for corporations other than the state. A university, for example, may make concessions with regard to the production and sale of its logo for the football team.

Here, we must pause to clarify these two legal terms of art, *fiction* and *concession*. The strong version of the fiction-model will hold that there is no group-person of any sort behind the legal mask. John Austin, for instance, described groups as subjects only by '*figment* for sake of brevity of discussion'.<sup>45</sup> In philosophy, science, and law it is driven by the premise of methodological individualism – namely, that social unities and relations among members can be reduced to nonsocial properties of members or composites thereof.<sup>46</sup> The concession-model, however, refers to societies made legitimate by the law. Concession can remain open to the reality of the group prior to the state's award of jural capacities. Until then, they are regarded either as so unimportant as to receive no notice, or they are regarded as illegitimate. The real group simply moves from being not officially recognized to being publicly capacitated. Both *fiction* and *concession* have been used by the modern state in ways which are prejudicial and harmful to societies other than the state.<sup>47</sup> When these two legal devices are

title 'Catholic' without ecclesiastical concession (Can. 216). Some private associations are merely praised or recommended (Can. 299 §2); or they might be approved when its statutes are reviewed by a competent authority (Can. 299 §3); no association can call itself Catholic without consent of the proper authority (Can. 330, and 312, 803 §3); still others can be regarded as public, acting in the name of the Church, and are said to be 'erected' (Can. 301). Can. 116 §1 provides for juridical persons to act in the name of the Church, while §2 provides for an association to act in its own name with ecclesiastical approval. Unfortunately, the Code does not provide a synthetic account of these various *personae*.

<sup>45</sup> Lord Coke's famous dictum: 'It is a fiction, a shade, a nonentity, but a reality for legal purposes. A corporation aggregate is only in abstracto – it is invisible, immortal and rests only in intendment and consideration of the law'. *Case of Sutton's Hospital* (1612), 5 Rep. 303; 10 Rep. 32 b.

<sup>46</sup> The array of contemporary positions on methodological individualism and its alternatives is summarized by Frederick F. Schmitt, 'Socializing Metaphysics', *Socializing Metaphysics: The Nature of Social Reality*, edit. Frederick F. Schmitt (Lanham: Rowan & Littlefield Pub., 2003), 1-37.

<sup>47</sup> In 2007, for example, China's State Administration of Religious Affairs announced Order No. 5, a law covering the 'Management Measures for the Reincarnation of Living Buddhas in Tibetan Buddhism'. The state prohibits Buddhist monks from returning from the dead without government permission. No one outside China can influence the reincarnation process, and only monasteries in China can apply for the concession. *Harper's Magazine* (March 2008), 20.

used in tandem, the state will command its lawyers to consider only the state's construction, not the very group that gave rise to the issue in the first place.<sup>48</sup> The state regards and treats all group-persons as out-sourced instruments of its own group-personality.

The modern French state began precisely on this note. Consider article-3 of the French *Declaration of the Rights of Man and Citizen* (1789): 'The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation'.<sup>49</sup> Two years later, the state passed a law against corporations:

'Since the abolition of all kinds of corporations of citizens of the same occupation and profession is one of the fundamental bases of the French Constitution, re-establishment thereof under any pretext or pretence or form whatsoever is forbidden' (§1). 'Citizens of the same occupation or profession...may not, when they are together, name either president, secretaries, or trustees, keep accounts, pass decrees of resolutions, or draft regulations concerning their alleged common interests' (§2).<sup>50</sup>

<sup>48</sup> On the problem of conflating concession and fiction, see Janet McLean, 'Personality and Public Law Doctrine'. *University of Toronto Law Journal*, Vol. 49, No. 1 (Winter 1999), 129-30.

<sup>49</sup> John Hall Stewart, *A Documentary History of the French Revolution* (New York: Macmillan, 1951), Document 17, at p. 114.

<sup>50</sup> Chapelier Law, 14 June 1791. Stewart, Document 28, p. 165. Indeed, more than a century later, the Third Republic enacted such legislation: 'No religious congregation may be formed without an authorization given by law which that determine the conditions of its exercise...The dissolution of a congregation or the closing of any establishment may be declared by a cabinet decree'. French Law of Associations, title III, §13 (1 July 1901). In his fine study of the Revolution's rejection of 'the society of orders and *corps*, or corporations', Pierre Rosanvallon emphasizes that Isacc-René-Guy Le Chapelier and his colleagues meant by *régime corporatif* more than the specifically economic institutions. They meant a regime consisting of plural societies, each with its own distinctive legal bonds, usually with its own distinctive signs and costumes, together making up the whole of the body politic: estates, religious corporations (clerical and religious congregations), guilds, clubs, municipalities, and so forth. If property-owning corporations exist, said Jacques-Guillaume Thouret, they differ from natural individuals who possess innate faculties and rights. 'Corporations are merely instruments fabricated by the law for the greatest possible good'. They are trustees of a public service mission located in the state. Rosanvallon notes: 'But the essential question was philosophical: corporate ownership inherently raised the prospect of a rival to public authority. The corporations in a sense threatened the state's claim to a 'monopoly on perpetuity,' a perpetuity being in the order of temporality the equivalent of generality in the order of social forms'. Pierre Rosanvallon, *The Demands of*



The multi-faceted order of estates, corporations, guilds, clubs – each with its distinctive legal bonds and signs and costumes – are swept aside as alien to the unity of the body politic.

In modern times, most revolutionary regimes will attempt to forbid subsidiary societies. History testifies that even the most brutally centralizing regimes eventually will retreat from the totalitarian ideal. They will make concessions. Why should the sovereign ever grant a concession? For our purposes today we might think of *devolution*, which often has a very strong resemblance to the older concession model. Imagine a homogeneous power formally belonging to the state. But the state decides to parcel-out aspects of this power from the top-down, or from the center to the periphery. While the state does not deny its own plenitude of power or sovereignty, it does recognize the contingent fact that it cannot efficiently reach all of the objects within its formal power. Accordingly, the state will out-source power, by way of a quasi-delegation, to other groups for the purpose of efficiently creating and distributing certain goods and services: education, charitable relief of the poor, and the orderly transfer of property or investment, to mention only a few. The complexity and scale of modern states practically guarantee that the sovereign must make concessions. It must, in this sense, *learn to*

*Liberty: Civil Society in France Since The Revolution*, trans. Arthur Goldhammer (Cambridge: Harvard University Press, 2007), 28.

In this connection, we should bear in mind original meaning of ‘solidarity’. In France, *solidaires* were those bound together in collective responsibility, according to the semi-autonomous societies called *communautés*. The idea of *solidarité* was drawn remotely from the legal expression *in solidum*, which, in Roman law, was the status of responsibility for another persons’ debts. Usually, the legal status of *solidaires* presupposed membership in a society (nation, family, etc.) that persists over time and is not exhausted in a single exchange nor characterized as a limited liability partnership. The Napoleonic Code (1804) expressly forbade the presumption of *solidarité* (art. 1202) in order to underscore the ontology of natural persons bound together chiefly, or only, in the state, and secondarily by contracts engaged by individuals. Thus, one becomes a *solidaire* only contractually (arts. 395-396, 1033, 1197-1216, 1442, 1887, 2002). With the revolutions which followed in the wake of the Napoleonic wars, and with the onset of the industrial revolution, the term ‘solidarity’ began to acquire the plethora of meanings it has today: solidarity of workers, political parties, nations, churches, and humanity in general. This was due to the widespread alarm at the disintegration of society and a renewed interest in intermediate associations. The historical evolution of the term is tracked within the Jewish community by Lisa Moses Leff, ‘Jewish Solidarity in Nineteenth-Century France: The Evolution of a Concept’, in *The Journal of Modern History*, Vol. 74, No. 1 (Mar., 2002), 33-61. The more global history is provided by Steinar Stjerno, in *Solidarity in Europe: The History of an Idea* (Cambridge: Cambridge Univ. Press, 2004).

*devolve*.<sup>51</sup> While despotic regimes will tend to be stingy, liberal regimes will tend to be generous in giving concessions. England was the model for a liberal regime, jealous of its sovereignty, but ever ready to out-source certain functions to corporations and to unincorporated groups and to trusts, even to pirates acting as auxiliaries of the royal navy.

The golden-age of concession theory was the 18th and 19th centuries because it was during this time that states were created according to the modern idea of sovereignty. Yet this model is quite durable, never entirely disappearing, even in our time. Take, for example, the debates in Europe and the United States over the issue of marriage. What kind of juridic person is a marriage? In 1992, the Hawaiian Supreme Court defined marriage as ‘a partnership to which both parties bring their financial resources as well as their individual energies and efforts’.<sup>52</sup> This point was reiterated in the controversial 2003 decision of the Massachusetts Supreme Court, which prohibited the legislature from giving legal title of marriage only to one man and one woman. Let’s put to one side the moral issue of whether marriage ought to be exclusively heterosexual. This puts the cart before horse. First, we want to know whether there are group-persons distinct from partnerships, and second what reason the state has to recognize them.

We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage...*Civil marriage is created and regulated through exercise of the police power*...Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported when-

<sup>51</sup> The word devolution is commonly used in a generic sense, to speak of decentralization. I prefer the standard 18th century sense of the term, as used by Edward Gibbon in *The Decline and Fall of the Roman Empire*: ‘The character of the civil and military officers, on whom Rufinus had *devolved* the government of Greece, confirmed the public suspicion, that he had betrayed the ancient seat of freedom and learning to the Gothic invader’. Vol. 3 XXXI.1. Or speaking of Maxentius: ‘Whilst he passed his indolent life either within the walls of his palace, or in the neighboring gardens of Sallust, he was repeatedly heard to declare, that he alone was emperor, and that the other princes were no more than his lieutenants, on whom he had *devolved* the defence of the frontier provinces, that he might enjoy without interruption the elegant luxury of the capital’. Vol. I, XIV. Hence, governments, powers, treasuries are said to *devolve*.

<sup>52</sup> *Baehr v. Lewin*, 852 P. 2d 44, 58 (citing *Gussin v. Gussin* 73 Hawaii 470, 483, 836 P. 2d 484, 491, 1992).

ever possible from private rather than public funds, and tracks important epidemiological and demographic data.<sup>53</sup>

We read that the state does not merely regulate, but creates marriage through the exercise of the police power. What aspects of good order move the state to allow married people to be a right-and-duty unity? The Court mentions economic reasons (property), sociological reasons (stable relationships), health reasons (care for the old or indigent), and scientific reasons (collection of epidemiological data). The state breathes into the dust of sexual relationships and private aspirations to intimacy, and creates a 'person' at law. This person, then, becomes the site or occasion for bringing about more efficiently certain results which are in the interest of the state.<sup>54</sup> All that remained for the Massachusetts Court to do was to judge that one sex or two sexes are immaterial to the state's interest in having other agents procure the publicly desirable results, and therefore not to favor one arrangement over the other. The Massachusetts decision is a pure example of concession theory. The Court leaves untouched the question whether this juridic person is a society or a partnership. The public efficiencies falling within the purview of the positive law could be attached to either a partnership or a society.<sup>55</sup> Indeed, the law of unilateral no-fault divorce guarantees in practice, if not in theory, that a marriage is a partnership.

<sup>53</sup> Goodridge v. Dept. of Public Health, 440 Mass. 309 (1993).

<sup>54</sup> Compare to Justice Joseph Story, a jurist from Massachusetts and Chief Justice of the Supreme Court. '[Marriage] may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent and not the child of society'. Joseph Story, *Commentaries on the Conflict of Laws* (1834), 100.

<sup>55</sup> The 1801 draft of the French *Code Civil* proposed that 'what marriage in itself is was previously unknown, and it is only in recent times that men have acquired precise ideas on marriage'. An important response to the draft was undertaken by Viscomt Louis de Bonald (1754-1840). Published in 1801 under the title *On Divorce*, this little philosophical and legal brief contributed to the suppression of the law of divorce in 1816, until the Third Republic reinstated it in 1884. Since social unity is a minimal requirement for law to gain any footing in the question of marriage, Bonald reasons that the issue pivots on 'the unity of union and the multiplicity of unions'. [*Ibid.*, 63.] There are three options. *First*, union of the sexes with the intention *not* to form a society, which even the law recognizes as promiscuity rather than marriage. *Second*, union of the sexes *without* an intention to form a society, which is concubinage. *Third*, union of the sexes *with* a commitment to form a society. In effect, Bonald outlines the three categories which we have used in this paper: (1) sexual union as a concourse of wills, (2) sexual union as partnership, (3) sexual union constituted in a society.

### 3.B. *Devolution Model: Intermediate Powers*

While the concession model is by no means dead, its star has been in eclipse during the second part of the 20th century. Especially after the Second World War, there has been interest in reviving another strand of liberalism on the issue of civil society – one that emerged in the 18th and 19th centuries in reaction to state absolutism. In France, we think of Montesquieu and Tocqueville – or perhaps James Madison in the United States. Emile Durkheim observed: ‘If that collective force, the State, is to be the liberator of the individual, it has itself need of some counterbalance; it must be restrained by other collective forces, that is, by...secondary groups...[for] it is out of this conflict of social forces that individual liberties are born’.<sup>56</sup>

We may call it the power-checking model, because it estimates the value of groups other than the state chiefly in terms of a check upon untrammelled power. Montesquieu wrote: ‘Political liberty is found only in moderate governments... It is present only when power is not abused, but it eternally been observed that any man who has power is led to abuse it; he continues until he finds limits...So that one cannot abuse power, power must check power by the arrangement of things’.<sup>57</sup> Hence, the famous idea of civil society as ‘intermediate powers’. What interested Montesquieu was not the specifically social landscape, or the *milieu intérieur*, of corporate persons (an ontology that perhaps he took for granted) so much as the general distribution of

<sup>56</sup> E. Durkheim, *Professional Ethics and Civic Morals*, Free Press, 1958, 62-63. Hutchins, 6, n. 2. Durkheim’s work is a complicated subject. On one hand, no one labored more strenuously in the 19th century to establish the objective reality of *faits sociaux* and the *sui generis* status of social facts. He vigorously rejected any methodology that would reduce social to non-social facts. Even so, he viewed society in the distinctively modern way of powers, forces, and their equilibrium. Thus, the idea *corps intermédiaires* was developed in view of the need to check the power of the state, even substituting for the family which, in modern times, had no such clout. Generally, he tended toward a kind of substantialism. Some authors, however, have attempted to put him into an Aristotelian tradition. For his distinction between mechanical (primitive) and organic (modern) solidarity suggested that organic solidarity is just what Aristotle and Thomas meant by a unity of order. The title page of his *Division of Labor* cites Aristotle’s *Politics* (I, 1261a24) on the point that the real unity of the polis must include a diversity of elements. While this might indicate the intrinsic value of hierarchical order of social solidarities nested within others, it also comports with the idea of powers limiting other powers. On Durkheim’s penchant for describing collective forces along the lines of thermodynamics and electricity, its seeming conflict with organic metaphors, and Durkheim’s quest to win a scientific recognition of sociology, see Steven Lukes, *Émile Durkheim: His Life and Work* (New York: Penguin Books, 1973), 215ff.

<sup>57</sup> Montesquieu, *Spirit of the Laws*, 11.4.

'powers'. Civil society is useful as an arrangement that checks abuse of power and thereby inclines a political society to moderation.

This line of thought concedes to the state its monopoly over public things. Importantly, it differs from the concession model with regard to the end to be achieved. Whereas the concession model seeks to protect and maintain state sovereignty by out-sourcing its power to other groups, the power-checking model endeavors to shrink its scope – at least materially and politically. Let the state be sovereign in the 'modern' sense of the term; but let this sovereignty be materially diminished by intermediate groups. These groups are not estates in the old sense of the term, for they have no representative power or authority; they do not constitute political bodies. Rather, the intermediate powers constitute a vast sphere of *private* judgments, choices, and actions by individuals and associations. Understanding that the state was no longer limited from above, it followed that its power is limited either from within (e.g. the division of powers), or from below.

The power-checking model treats devolution as *privatization*. It, too, wants the state to devolve for reasons of efficiency, but with a value-added purpose. For example, private schools are useful not only because they efficiently allocate educational resources, but also because they check the untrammled state power over education. This double efficiency has always proved essential to the liberal social theory. Like the two faces of Janus, it looks in one direction toward private competition, organization, and efficient distribution of resources, and it looks in the other direction toward the negative liberty accruing from private initiative. The state is put in the position of having to justify, on cost-benefit grounds, why the private sphere should not prevail whenever there is a concurrent jurisdiction or interest in a common thing: fisheries, education, capital investment, etc.

In both the United States and Europe, this model is often associated (more or less explicitly) with 'subsidiarity'.<sup>58</sup> In the next section, I will explain why we should resist the equation. But for now I call attention to the fact that the intermediate powers analysis is not principally interested

<sup>58</sup> Whether the European Community treaties (and amendments) mean by subsidiarity something more than a rule of social efficiency is difficult to determine because the original language, informed by Catholic social thought (mostly through the German thinkers) was transported to a more lawyerly emphasis on constitutional allocation of powers. The difference between the two is intelligently surveyed by Christoph Henkel, 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiary', 20 *Berkeley J. Int'l L.* 359 (2002), 359-386.

in the sociality of diverse group-persons. It focuses rather upon efficiency, which is the common coin of public policy and discourse. It matters little whether the efficiencies have this or that social form. The key insight is that the state be limited by the private sphere. If we ask why the state should be so limited, the answer will be that it increases liberty and that such an arrangement is more efficient.

Along these lines, perhaps the most astute and powerful argument for civil society was made by Ernest Gellner, in *Conditions of Liberty: Civil Society and its Rivals* (1994). Gellner points out that 'civil society' is ambiguous. From one point of view, civil society can mean the 'social residue left when the state is subtracted'.<sup>59</sup> Consisting of strong bonds of solidarity in family, tribes, and religious institutions, this 'residue' can prove to be very potent. The polycentric nature of traditional societies is very effective if we were only interested in checking the power of the modern state. In a modern, democratic culture, however, civil society must not only check state power, but must also liberate the individual from the suffocating obligations of common faith and kinship. The 'miracle of civil society' requires loose associations which protect individual liberty from the solidaric bonds of the state and traditional communities. Once the strong solidarities from above and below are weakened, we enjoy the kind of society suitable to what he calls the 'modular man'.

The [western conception of civil society] has not committed itself either to a set of prescribed roles and relations, or to a set of practices. The same goes for knowledge: conviction can change, without any stigma of apostasy. Yet these highly specific, unsanctified, instrumental, revocable links or bonds are effective. The associations of modular man can be effective without being rigid.<sup>60</sup>

Gellner's work is important because he delineates the full implications of the 'counterweight' theory of civil society: *devolution from above and disincorporation from below*. His sociology is at once descriptive and normative – at least for us, who live in a market culture, and who prize the associational life of 'modular man'. That human nature is sociable, and that sociability is capable of strong solidarities from above and from below are not in question. The question, rather, is whether such strong solidarities are

<sup>59</sup> Ernest Gellner, *Conditions of Liberty: Civil Society and its Rivals* (New York: The Penguin Press, 1994), 212.

<sup>60</sup> *Ibid.*, 100.

useful and agreeable to the democratic culture. Gellner has emphasized what we have called partnerships rather than a plurality of societies possessing intrinsic common goods. I will now go on to argue that this position, though perhaps descriptively accurate of contemporary society, should not be confused with subsidiarity.

### 3.C. Summary

- The concession-model regards group-persons other than the state as legitimate only insofar as they receive the state’s concession or imprimatur. Though it enjoys a monopoly on group-personhood, the state can out-source its power to other groups, depending upon the state’s estimation of the public utilities of so doing. This model, therefore, should be called devolution.
- The fiction-model reduces societies to their non-social properties. Whereas the concession model insists that the group is illegitimate until it receives the legal mask (*persona*), the fiction model holds that there is nothing but the legal mask. In modern states, these two models often work in tandem.
- The model of intermediate powers holds that the existence of group persons other than the state is useful: (1) for checking the power of the state, (2) for distributing more efficiently certain goods and services, and (3) for checking the power of strong solidarities from below, which tend to restrict individual liberties.<sup>61</sup> It, too, tends to understand subsidiarity as devolution.

## IV. THE SUBSIDIARITY MODEL IN CATHOLIC THOUGHT

The existence of social persons distinct in dignity, reducible neither to the individual nor the state, stands at the outset of Catholic social doctrine. As well it should, for the Church claimed to be a *persona moralis* instituted

<sup>61</sup> We do not suggest that efficiency is of no importance. The first question, however, is efficient ‘to whom?’ Every genuine society, which, as we have emphasized, has both an intrinsic common good (the order) and an extrinsic common good (the victory of army, to use Aristotle’s example), will take interest in the efficiencies touching upon the division of labor and the extrinsic results. Indeed, deliberate mutations of societies often occur because of new estimations of efficiency.

by Christ. Moreover, nested within this trans-jurisdictional ecclesial society were a host of subsidiary societies: families, religious orders and congregations, sodalities, colleges, associations of pilgrims, warrior orders, and a myriad of other associations, like guilds, which overlapped with municipal and temporal societies. Even into 18th century, the Catholic Church was an extraordinarily diversified and interdependent social order.

Catholic sovereigns were deemed to be junior apostles, receiving privileges to govern much of the temporal estates and life within their realms. The French Revolution's *Civil Constitution of the Clergy* (1790) unilaterally overturned the common law of political Christendom. Church governance was handed over *not* to the mischievous but familiar Catholic ruling families, but instead was given to the nation. The clergy became civil servants elected by democratic vote. This model spread to the former colonies, particularly in Latin America. Rights once belonging to the Church had been transferred to kings, and now to the nation. The state was no longer governed by anointed laity, but by a new doctrine of *laicism*.

Once the modern states asserted their monopoly on group-personhood, they were bound to collide with the Church. In Europe and in her former colonies, the Catholic Church not only lost its political privilege in the new nation-states. The Church, along with her religious orders, schools, seminaries, and sodalities was stripped of juridic personality – except such as remained by concession of the states. A society of monks, for example, could not hold themselves out to the rest of society as monks, but rather as makers of pottery. The monastic society was given the status of a business partnership – which is not only an act of concession but also of fiction. Article 27 of the 1917 Mexican constitution was more severe: 'The law recognizes no juridical personality in the religious institutions known as churches'.

To be sure, the principles of social order were ancient. But the post-1789 church-state crisis is what gave the Church real incentive to develop a body of social doctrine. On this score it is important to understand that the social doctrine did not begin with the industrial revolution and the problems of benighted and dislocated workers. It began with the need to defend the institutions of the Church. Catholic social doctrine, accordingly, emerged in defense of two propositions: first, that the state does not enjoy a monopoly over group-personhood; second, that societies other than the state not only possess real dignity as rights-and-duties bearing unities, but that they also enjoy modes of authority proper to their own society.



In his famous encyclical *Rerum novarum* (1891), Pope Leo XIII defended the right of workers to form associations. The following passage touches the nerve of the issue:

‘Private societies, then, although they exist within the body politic, and are severally part of the commonwealth, cannot nevertheless be absolutely, and as such, prohibited by public authority. For, to enter into a ‘society’ of this kind is the natural right of man; and the *civitas* has for its office to protect natural rights, not to destroy them; and, if it forbid its citizens to form associations, it contradicts the very principle of its own existence, for both they and it exist in virtue of the like principle, namely, the natural tendency of man to dwell in society. There are occasions, doubtless, when it is fitting that the law should intervene to prevent certain associations, as when men join together for purposes which are evidently bad, unlawful, or dangerous to the *respublica*. In such cases, public authority may justly forbid the formation of such associations, and may dissolve them if they already exist. But every precaution should be taken not to violate the rights of individuals and not to impose unreasonable regulations under pretense of public benefit...The State should watch over these societies of citizens banded together in accordance with their rights, but it should not thrust itself into their peculiar concerns and their organization, for things move and live by the spirit inspiring them, and may be killed by the rough grasp of a hand from without’.<sup>62</sup>

According to Leo, such societies spring from the same source as the state, the ‘tendency of man to dwell in society’. Society does not devolve from the state or come into existence because of the state’s need to outsource powers for socially useful ends. Notice Leo’s swipe at the ‘public

<sup>62</sup> *Rerum novarum* (15 May 1891), §§51-53, 55, *Leonis XIII P.M. Acta* XI, 135-137. Leo here defends the rights of private associations on the basis of Thomas’s defense of Mendicant poverty in *Contra Impugnantes*, written in 1256. In Thomas’s works, every analogous use of the word *societas* is mirrored by uses of the word *communicatio*: *communicatio oeconomica*, *communicatio spiritualis*, *communicatio civilis*, and so forth. The word *communicatio* simply means making something common, one rational agent participating in the life of another. Society, for Thomas, is not a thing, but a communication. He quotes Augustine’s *De Doctrina Christiana*: ‘Everything that is not lessened by being imparted, is not, if it be possessed without being communicated, possessed as it ought to be possessed’. *Contra Impugnantes*, I.4. §14 A83 1265-70.

benefit' argument, which recalls the problem of concession theory. The key point is that, whatever the differences obtaining between political union, ecclesiastical union, familial union, and the many kinds of voluntary unions about which Leo speaks in this passage, they have something in common: the natural social tendency of the human person. True enough, there are qualitative differences between a state, a church, and a family. Yet no one of these societies uniquely instantiates the genus 'social'. The state, for example, does not represent the genus 'social' under which are arrayed the church or family as 'species'. This also holds in the opposite direction. The state is not a species of the Church's solidarity, although the state's unique order may be assisted and inspired by the Church's union.

Every social formation embodies diversity (*pluritas et inaequalitas*), for such is necessary for a unity of order in which the members each enjoy their own operations. We can think of Durkheim's distinction between (1) a 'mechanical' expression of the *conscience collective*, in which the group conscience is co-extensive with, and coincides at all points with, the individual's, and (2) an 'organic' solidarity in which individuals are grouped by their different activities or functions. The latter kind of solidarity approximates a 'unity of order'. Yet the same principle holds when we ask what kind of order obtains among qualitatively different societies. This is preeminently a political question. How does the state function as a union of social unions without reducing society to 'powers' which differ only quantitatively? It was precisely on this problem that the 'intermediate powers' analysis of the French and the American thinkers stumbled. Social diversity was reduced to a thermodynamics of power. Leo puts the issue differently. Even if the state has the special and very august function of ordering its members to a common good, that common good, in turn, must protect the common goods of diverse societies within it.

Leo introduces another issue. He writes: 'In order that an association may be carried on with unity of purpose and harmony of action, its administration and government should be firm and wise. All such societies, being free to exist, have the further right to adopt such rules and organization as may best conduce to the attainment of their respective objects'.<sup>63</sup> Wherever is a society marked by common ends and unity (or harmony) of action, there must be authority. Leo's point is that the state will do an injustice if it allows societies to exist, but denies their capacity for self-government.

<sup>63</sup> *Rerum novarum*, §56.

Where there is no right to group authority, common action will depend entirely on spontaneous unanimity. This is hardly possible in a family, much less in an economic corporation, a university faculty, a church, or even a sports team. Hence, a state that recognizes the existence of civil society, but not the diverse modes of authority appropriate to those societies, reduces civil society to mere partnerships. Recall our earlier point that partnerships have no inherent need of authority, except accidentally, when breach of contract requires the ministry of the courts.

Now, at last, we can address the principle of subsidiarity and distinguish it from devolution. The term was coined by the nineteenth-century Italian Jesuit, Luigi Taparelli. For Taparelli and the tradition of Catholic social doctrine, subsidiarity is not a free-standing concept. As a principle regulating and coordinating a plurality of group-persons, subsidiarity presupposes a plurality of such persons, each having distinct common ends, kinds of united action, and modes of authority. It is not, therefore, a question of whether there shall be group-persons, or whether they are efficient or immediately useful to the state. Rather, the question is how these groups stand to one another and to the state. In its negative formulation, subsidiarity demands that when assistance (*subsidium*) is given, it be done in such a way that the sociality proper to the group (family, school, corporation, etc.) is not subverted. Taparelli, used the term *ipotattico*, taken from the Greek *hypotaxis*, the rules governing the order of clauses within a sentence. Rendered in Latin as *sub sedeo*, subsidiarity evokes the concept not only of subordinate clauses in a sentence, but also of auxiliary troops in the Roman legion which ‘sat below’, ready and duty-bound to render service.

Hence, it describes the right (*diritto ipotattico*) of social groups, each enjoying its own proper mode of action. While sometimes identified with the word *subsidium* (help, assistance), the point of subsidiarity is a normative structure of plural social forms, not necessarily a trickling down of power or aid.<sup>64</sup> Taparelli used the expression *associazione ipotattica* to emphasize the interdependence of societies, each maintaining its own unity (*conservare la propria unità*) without prejudice to the whole.<sup>65</sup>

<sup>64</sup> The history and philosophy of subsidiarity are covered with unusual clarity by Thomas C. Behr, ‘Luigi Taparelli D’Azeglio, S.J. (1793-1862) and the Development of Scholastic Natural-Law Thought As a Science of Society and Politics’, *Journal of Markets & Morality*, Volume 6, Number 1 (Spring 2003), 99-115.

<sup>65</sup> Luigi Taparelli D’Azeglio, *Saggio teoretico di diritto naturale appoggiato sul fatto*. 8th edition (Rome, 1949), 685, 694.

On this view, subsidiarity, cannot be construed as judgments, decisions, actions at the 'lowest level'. The notion of a 'lowest' level perverts the concept of subsidiarity. The better term is *proper* level. The term 'proper' is taken from the Latin word *proprium*, denoting what belongs to, or what is possessed by, a thing or person. On the modern view of the state, there are only two persons having *propria*: the artificial person of the state, and natural, individual persons. The 'lowest' level can only mean the individual, or, perhaps, partnerships. Subsidiarity, on the other hand, presupposes that there are plural authorities and agents having their 'proper' (not necessarily, lowest) duties and rights with regard to the common good – immediately, the common good of the particular society, but also the common good of the body politic. Pius XII noted that 'every social activity is for its nature subsidiarity; it must serve as a support to the members of the social body and never destroy or absorb them'.<sup>66</sup> Just as no society should destroy or absorb the individual person, so too no particular society should destroy the personhood of other societies.

To be sure, subsidiarity is often described and deployed in a defensive sense – as to what the state may *not* do or try to accomplish – but the principle is not so much a theory about state institutions, nor of checks and balances, as it is an account of the pluralism and sociality of society.<sup>67</sup> Once we

<sup>66</sup> *La elevatezza e la nobiltà* (20 Feb. 1946), AAS 38, 144f.

<sup>67</sup> As we pointed out earlier, Thomas taught, there are two ways to imitate God: as *bonum universale in essendo* (just as he is good in himself) and *bonum universale in causando* (causing goodness in others), S.t. I, 103.4. In the order of the operations of secondary causes, creatures are executors of providence (Scg I, 22.3.2). The more extensively the creature communicates its own goodness to others, the more perfect its participation (Scg III.24). But this presupposes diversity – *pluritas et inaequalitas* (Scg II.45.4): 'Then, too, a thing approaches to God's likeness the more perfectly as it resembles Him in more things. Now, goodness is in God, and the outpouring of goodness into other things. Hence, the creature approaches more perfectly to God's likeness if it is not only good, but can also act for the good of other things, than if it were good only in itself; that which both shines and casts light is more like the sun than that which only shines. But no creature could act for the benefit of another creature unless Plurality and inequality existed in created things. For the agent is distinct from the patient and superior to it. In order that there might be in created things a perfect representation of God, the existence of diverse grades among them was therefore necessary'.

Thomas is speaking here *not* of the inequality of freedom or humanity, but rather one of diverse talents, grades, and functions (S.t. I, 96.4; and see II *Scriptum super Libros Sent.* 44, 1, 3 [solutio]). The Social Magisterium has repeatedly insisted that a society of any kind presupposes such diversity. In *Rerum novarum*, for example: 'It must be first of all recog-

distinguish subsidiarity from the similar but misleading notions of devolution, it is easier to grasp why it was introduced in Catholic circles as an aspect of social justice. For Pius XI, social justice is that kind of order that ensues when each person is capacitated to ‘exercise his social *munus*’, to contribute to the common good according to his proper office and role (function).<sup>68</sup> This may or may not require the giving of aid, the correction of a deficiency, or the removal of barrier to the performance of social duties, but what it always entails is respect for a pluriform social order in which the various societies are intrinsically valuable as ‘persons’ distinct in dignity. The state may award a certain legal mask. Indeed, this can count as

nized that the condition of things inherent in human affairs must be borne with, for it is impossible to reduce civil society to one dead level. Socialists may in that intent do their utmost, but all striving against nature is in vain. There naturally exist among mankind manifold differences of the most important kind [*Sunt enim in hominibus maximae plurimaeque natura dissimilitudines*]; people differ in capacity, skill, health, strength; and unequal fortune is a necessary result of unequal condition. Such inequality is far from being disadvantageous either to individuals or to the community. Social and public life can only be maintained by means of various kinds of capacity for business and the playing of many parts [*ad res gerendas facultate diversisque muneribus vita communis*]; and each man, as a rule, chooses the part which suits his own peculiar domestic condition’. *Rerum novarum*, §17, Acta XI, 108.

And in Pius XI’s *Divini redemptoris*: ‘But God has likewise destined man for civil society according to the dictates of his very nature. In the plan of the Creator, society is a natural means which man can and must use to reach his destined end. Society is for man and not vice versa. This must not be understood in the sense of liberalistic individualism, which subordinates society to the selfish use of the individual; but only in the sense that by means of an organic union with society and by mutual collaboration the attainment of earthly happiness is placed within the reach of all. In a further sense, it is society which affords the opportunities for the development of all the individual and social gifts bestowed on human nature. These natural gifts have a value surpassing the immediate interests of the moment, for in society they reflect the divine perfection, which would not be true were man to live alone [*divinamque praeferunt in civili ordinatione perfectionem, quod quidem in singulis hominibus contingere ullo modo nequit*]. *Divini redemptoris* (19 March 1937), §29, AAS 29 (1937), 79.

In §29 of *Divini redemptoris*, Pius adds the following sentences. ‘But on final analysis, even in this latter function, society is made for man, that he may recognize this reflection of God’s perfection [*ut hanc divinae perfectionis imaginem*], and refer it in praise and adoration to the Creator. Only man, the human person, and not society in any form is endowed with reason and a morally free will’. *Ibid.* A decade later, Jacques Maritain argued that the political ‘madness’ of the twentieth century could be traced to the ideology of ‘substantialism’, the doctrine that the state is a moral person in the proper (substantial) sense of the term. *Man and the State* (Chicago: University of Chicago Press, 1951), at 14, note 11 at 16.

<sup>68</sup> *Divini redemptoris* (19 March 1937), §51, AAS 29 (1937) at 92.

an example of aid or *subsidiium* required by commutative or distributive justice. But this should not be confused with the doctrine that societies are constructed by the state as out-sourced facets of the state's need to devolve.

Now we are prepared to explain why the 18th century category, *doctrina civilis*, came in the 20th century to be called *doctrina socialis* – social doctrine. With the triumph of the modern nation states, equipped with an exaggerated premise of state sovereignty, it was a given that man is a citizen, but it was not so clear how, or whether, he ought to be a member of other societies – from vocational and trade associations, to churches, families, sodalities – even to what could be called nations. We cannot forget that Pius XI began to use the terms 'social justice' and 'social doctrine' just when the totalitarian regimes had the wind at their backs, and when the free polities had to intervene extensively and deeply in their national economies. Both the totalitarians and the imperatives of the post-1929 economic crisis made precarious the predicate 'social'.

In his encyclical *Centesimus annus* (1991), Pope John Paul II weaves together the different strands of these ideas:

[The] primary responsibility in [social justice] belongs not to the State but to individuals and to the various groups and associations which make up society...In addition to the tasks of harmonizing and guiding development, in exceptional circumstances the State can also exercise a *substitute function*...Such supplementary interventions, which are justified by urgent reasons touching the common good, must be as brief as possible, so as to avoid removing permanently from society and business systems the gifts of service which are properly theirs [*propria munera*]...Here again the principle of subsidiarity must be respected: a community of a higher order should not interfere in the internal life of a community of a lower order, depriving it of the functions which properly belong to it [*propriis officiis*].<sup>69</sup>

We must notice that JP II speaks of higher and lower *communities*.<sup>70</sup> This passage helps to illuminate how solidarity and subsidiarity, in Catholic

<sup>69</sup> *Centesimus annus* (1991), §48.

<sup>70</sup> See Pius XII's Speech to the secret consistory of Feb. 18, 1946 (AAS 38, 144ff; MA-I, 76ff). Pius says that 'every social activity is for its nature subsidiary; it must serve as a support to members of the social body and never destroy or absorb them. These are surely enlightened words, valid for social life *in all its grades* and also *for the life of the Church without prejudice to its hierarchical structure*'. [emphasis mine]. Pius does refer to 'what individual men can do for themselves and by their own forces', which of course 'should not

thought, stem from the same principle. Both presuppose the existence of a society – as Maitland said, an ‘ $n + 1$ ’ unity, where the unity is an intransitive good. Recall our earlier point that a society ordinarily survives defeat or failure of one or more of its purposes; it does not, however, survive the dissolution of united action. Since united action cannot depend entirely on unanimity, authority has an essential function within a society. This is why the principle of subsidiarity cannot be expressed adequately as the imperative that decisions be made at the *lowest possible level*.

Subsidiarity is nothing other than the principle that, when aid be given, it not remove or destroy the authority or functions (*munera*) proper to the society being assisted.<sup>71</sup> As Pope John Paul noted, in ‘exceptional circumstances’ the state may exercise a ‘substitute function’, but not in such a manner as to deprive the society of its ‘proper’ modes of union.<sup>72</sup> Subsidiar-

be taken from them and assigned to the community’. Though this might appear to be a reduction to the lowest level in an individualist sense, the whole context of the discussion suggests otherwise. Pius was speaking of the diverse and complex parts of the social structure; moreover, he does not refer just to individuals but also to ‘members’ of the social body. The whole point of the speech, indeed, was to warn about gigantic organizations with their flattening effect toward uniformity, which by centralizing destroy the equilibrium of social institutions. Calvez and Perrin, rightly alert their readers to the fact that Pius XI and Pius XII insisted that society is not a substantial or material body; it cannot have that kind of existence or unity. As Pius XI said, ‘a society can exercise no personal function save through its members’. In *Divini redemptoris* he reminded his readers that while social order reflects the divine perfection (a diversity of members causing good in others), only ‘the human person, and not society in any form is endowed with reason and a morally free will’. The letter was written against atheistic communism, so Pius had a special need to deny that society is not a natural or physical person. DR (19 March 1937), §29, AAS 29, p. 79. In his 1956 Speech to Catholic physicians, Pius XII reiterated this point. Catholic teaching does not consider man in his relationship with society as if he were put into the ‘organic mind of the physical organism’ (AAS 48, p. 679). All of this depends on keeping in view Thomas’s idea of a unity of order. When, by creeping metaphors and political ideology, both man and society are regarded as physical organisms, one or the other must be destroyed if there is to be unity. For several papal admonitions in this regard, see Jean-Yves Calvez, S.J. and Jacques Perrin, S.J., *The Church and Social Justice: The Social Teachings of the Popes from Leo XIII to Pius XII (1878-1958)*, (London: Burns & Oates, 1961), 123-132.

<sup>71</sup> On this notion of *munera* as functions, roles, and offices, and its connection to both Roman law and the sacramental theology of the Roman Church, see my essay: ‘Social Roles and Ruling Virtues in Catholic Social Doctrine’. *Annales theologici* 16 (2002), 385-408.

<sup>72</sup> ‘In every government the best thing is that provision be made for the things governed, according to their mode: for in this consists the justice of the regime. Consequently even as it would be contrary to the right notion of human rule, if the governor of a state were to forbid men to act according to their various duties, – except perhaps for the time

ity requires that the sociality of society be preserved. No argument to good results external to the society will suffice, unless one has moral reason to dissolve a society, regime, or party.

But this 'aid' must be sharply distinguished from the from the idea of the state imparting, out-sourcing, or conceding the social forms and functions of other groups. In *Mater et magistra*, John XXIII refers to the state's work as 'directing, stimulating, co-ordinating, supplying and integrating' a plurality of societies. 'Of its very nature', he concludes, 'the true aim of all social activity should be to help members of the social body, but never to destroy or absorb them'.<sup>73</sup> These groups 'must be really autonomous [*suis legibus re ipsa regantur*], and loyally collaborate in pursuit of their own specific interests and those of the common good. For these groups must themselves necessarily present the form and substance of a true community'.<sup>74</sup>

Thus, the Social Magisterium regarded social justice as a new way of presenting Thomas's understanding of general or legal justice. Thomas held that as charity 'may be called a general virtue in so far as it directs the acts of all the virtues to the Divine good, so too is legal justice, in so far as it directs the acts of all the virtues to the common good. Accordingly, just as charity which regards the Divine good as its proper object, is a special virtue in respect of its essence, so too legal justice is a special virtue in respect of its essence, in so far as it regards the common good as its proper object' (II-II, 58.6).

Every juridical proposition implies an inter-subjective relation, *sub specie alteritatis*. Justice always requires a relation to 'the other'. Therefore, all issues of justice have a social aspect. The cardinal virtue of justice pertains to particular justice, either bilaterally (commutative) or by distribution on the basis of merit (distributive). But there is another virtue that orders the myriad acts of the other virtues to the common good. It does not substitute for, or cancel-out, the justice of commutation and distribution. Rather, it is the practice of virtue 'looked at from the social point of view' – *sub specie societatis*.<sup>75</sup> We can also describe general justice as the harmonization of a heterogeneous whole which consists, in a unity of order, of other wholes:

being, on account of some particular urgency, – so would it be contrary to the notion of God's government, if He did not allow creatures to act in accordance with their respective natures'. *Contra impugnantes, op. cit.*

<sup>73</sup> John XXIII, *Mater et magistra* (15 May 1961), §53, AAS 53 (1961), 414.

<sup>74</sup> *Ibid.*, §65, 417.

<sup>75</sup> Jeremiah Newman, *Foundations of Justice* (Cork: Cork Univ. Press, 1954), 5.



both natural persons and social persons. This what is traditionally meant by polity, but it pertains analogically to every society *ad intra*.

To be sure, these subsidiary ‘wholes’ are the subjects of justice at both the level of commutation and distribution. Recognizing the natural right of parents as the primary educators of their children is not, in the first place, a question of social justice but rather of their rights vis-à-vis other individuals or societies. Strict justice, whether commutative or distributive, has as its object ‘a person equalized’,<sup>76</sup> whether the person be a natural individual or a society. But whenever we speak of a common good, we are not referring to a private right but rather membership and participation in a social order. Because the order is, itself, the common good, it is not amenable to commutation or distribution. This holds true analogously for any society possessing an intrinsic common good. A family, a church, or a polity cannot rightfully exchange or distribute the common good into private hands. Any relatively complex social unity of order will abound with commutations and distributions; but the common order is *not* divisible in this sense.

Consequently the way to get the common good into the possession of the members, the way to share among them the virtuous social life, is to develop that life, to serve the common good. There is no need for another direction to legal justice; what is good for the whole is good for the parts.<sup>77</sup>

No matter how different their respective ends and modes of unity, every society will require its members to learn how to participate rather than divide the common order.

Social justice is the virtue whereby all persons (not just the state) refer the ensemble of their relations to the common good. This is why subsidiarity is not merely an issue of commutation or distribution, but rather manifests itself in the arranging of things in such wise that the operations of a heterogeneous whole are harmonized with regard to the common good. If the operations proper to the parts are destroyed, one has violated both particular and social justice.<sup>78</sup> At the same time, it is not enough simply to do

<sup>76</sup> Leo W. Shields, *The History and Meaning of the Term Social Justice* (Notre Dame Press, 1941), 39.

<sup>77</sup> *Ibid.*, 39-40.

<sup>78</sup> Within a given polity, any number of things are distributed from the whole to the parts (diverse groups): status, proportional representation, monies, and so forth. These goods are enjoyed privately. Here, however, the term *private* means that this or that particular group is the terminal recipient – this family enjoys the tax relief, or that association enjoys use of the public building, and so forth. These societies themselves are deemed pri-

justice to the parts; the fact that parents enjoy a proper right to raise their children, that corporations have a proper right to organize capital and property, that national communities have a right to retain their traditional forms of unity, that individuals enjoy a right to religious conscience, are necessary but not sufficient conditions for the common good which is the object of the virtue of legal or social justice.

John Paul II made a similar point in his Address to the Fiftieth Assembly of the United Nations (5 Oct. 1995). Recalling the rather artificial political boundaries imposed upon the diverse peoples and nations after both

vate in comparison to the political 'whole'. Thomas refers to the sub-political group as a member of the 'whole' – a *unitas particularis*, which becomes disruptive insofar as it separates itself from the *unitas principalis*. (S.t. II-II, 39.1).

The particular unity of a subordinate group is still referable to a *unitas principalis*. What kind? Thomas is clear. The polity (*civitas vel regni*) which is constituted as a *unitas iuris*. To disrupt the unity of the political common good is a sin against justice in the sense of legal (or social) justice. Interestingly, Thomas notes that some discord within the polity is licit so long as the disputes are not contrary to the common good of all [*quod discordia ab eo quod non est manifeste bonum potest esse sine peccato*] (II-II, 42.2 ad 2). In other words, we should expect some friction and issues amongst the particular societies within the body politic. See *Centesimus annus* at §14: 'The Church is well aware that in the course of history conflicts of interest between different social groups inevitably arise, and that in the face of such conflicts Christians must often take a position, honestly and decisively. The Encyclical *Laborem exercens* moreover clearly recognized the positive role of conflict when it takes the form of a "struggle for social justice".'

There is nothing in the nature of polity, rightly considered, that entails social homogeneity. John Finnis rightly points out that general justice cannot require us to regard 'the state (rather than any and every community to which one is related) as the only direct object of general justice' (*Aquinas* [Oxford University Press, 1998], at 217). By the same token, there is nothing in the natures of diverse groups, rightly considered, that is opposed to being 'referred' once again to the wider unity of order. Again, Finnis points out that the 'common good which is the object(ive) of all justice logically cannot be distributed' (*Natural Law and Natural Rights* [Oxford: Oxford University Press, 1980], at 194). As he says, the common good is not 'a common stock' (at 168).

See, for example, Thomas's comparison of the common good of polity and of marriage.

'Just as the civic life denotes not the individual act of this or that one, but the things that concern the common action of the citizens [*sicut vita civilis non importat actum singularem huius vel illius, sed ea quae ad communicationem civilem pertinent*], so the conjugal life is nothing else than a particular kind of companionship pertaining to that common action. Wherefore as regards this same life the partnership of married persons is always indivisible, although it is divisible as regards the act belonging to each party'. (*Sent. Lib. IV, d. xxxvii, 1.1 ad 3.*)

Thus, any society consisting of common action for a common end enjoys an indivisible unity of order brought about by diverse actions of its members.

great wars of the 20th century, he quoted the remark of Pope Benedict XV, who in the midst of the First World War reminded everyone that ‘nations do not die’ [*riflettasi che le Nazioni non muoiono*].<sup>79</sup> The sense of this remark is that nations can constitute genuine social entities which may or may not, in the contingency of history, be constituted as states. However they are arranged within the broader juridical and geographical compass of states, they nevertheless have a right to exist in their own unique social forms. Nations are not mere aggregations of individuals nor temporary partnerships. The Pope went on to say:

But while the ‘rights of the nation’ express the vital requirements of ‘particularity’, it is no less important to emphasize the requirements of universality, expressed through a clear awareness of the duties which nations have vis-à-vis other nations and humanity as a whole. Foremost among these duties is certainly that of living in a spirit of peace, respect and solidarity with other nations. Thus the exercise of the rights of nations, balanced by the acknowledgement and the practice of duties, promotes a fruitful ‘exchange of gifts’, which strengthens the unity of all mankind.<sup>80</sup>

Importantly, the Pope is not suggesting that the social forms of these peoples have an absolute right to resist being ordered toward a broader polity, and with that polity, being harmonized with the other nationalities and groups. Rather, he is putting in play two distinct but interrelated notions of solidarity. On the one hand, the unity-of-order called a ‘nation’ has its own solidarity, and, in the order of strict justice, has a right to be regarded as something ‘one’. On the other hand, the nation, like every other subsidiary unity, is to be referred to the broader order – to the common good enjoyed by all groups within the polity. This is nothing other than the solidarity of social justice. Moreover, the Pope makes clear that this solidarity is referable once again to an international common good in which each polity enjoys the good of order with a multiplicity other polities.

In answer to the question why the traditional term general (or legal) justice was dropped in favor of social justice, at least one thing can be said. In modern times legal justice was confused with the virtue of obedience to the positive law of the state. Given the disposition and organization of the mod-

<sup>79</sup> John Paul II, *Address to the Fiftieth Assembly of the United Nations* (5 Oct. 1995), §6. Quoting *Allorché fummo chiamati* (28 July 1915), AAS 7 (1915), 367.

<sup>80</sup> *Ibid.*, §8.

ern states circa 1930, this confusion would have had drastic and grotesque consequences. The state then becomes the exclusive agent of social justice, as though the virtue resides entirely in the state, which then has the right to compel other persons (natural and social) to do what they have no natural inclination to do: namely, to consider their acts in relation to the common good. For his part, Leo XIII never relinquished the older term, general justice. But during the pontificates of Pius XI<sup>81</sup> and Pius XII, many Thomists, having given serious consideration to the situation, agreed that social justice should replace the older rubric. In view of the omnicompetent state of their era, and in view of the pressing need to articulate and defend an organic pluralism of society, it was not an unreasonable position to jettison the term 'legal' in favor of 'social' lest the common good of order be understood as exclusively the order of the state.<sup>82</sup> In short, it was more necessary to insist that the state is 'social' than to insist that the plural societies are 'political'.

In retrospect, we are entitled to question whether it achieved the right results. For one thing, social justice increasingly became associated with relations which ensue upon economic activity. From there, it became all too easy to regard social justice as chiefly concerned with economic commutations and distributions. Pius XI's dictum '[I]t is of the essence of social justice to demand from each individual all that is necessary for the common good' could only be obscured.<sup>83</sup>

While the common good includes commutations and distributions, the common good cannot, strictly speaking, be distributed but only participated. Undoubtedly, there are common goods distributed into private hands. 'Before distribution such goods are part of the common stock and belong to no one in particular, but after distribution they are private goods. The water, for example, in the city reservoir is neither mine nor yours except indeterminately. But once it flows through my tap it is mine.'<sup>84</sup> Traditional-

<sup>81</sup> In *Studiorum ducem* (29 June 1923), Pius XI makes explicit that Thomas is to be studied in order to formulate exactly *de justitia legale aut de sociali, itemque de commutative aut de distributive*. AAS 15 (1923), 322.

<sup>82</sup> For example, legal justice 'would be a most misleading and dangerous term today when the subordination of civil law to natural law is no longer generally recognized'. Alfred O'Rahilly, *Aquinas versus Marx* (Cork: Cork Univ. Press, 1948). At 36. But also Leo W. Shields, *op. cit.*, 47-64; and Jeremiah Newman, *op. cit.*, 99-121.

<sup>83</sup> QA §51.

<sup>84</sup> Froelich, *op. cit.*, 54.

ly, such utilities have been called *bona communia* (in the plural) in order to distinguish them from the *bonum commune* (the common good). Without common utilities privately used there could be no society. Nonetheless, utilities are ‘means’ for the purpose of a well-ordered community, which is not something private. Unless this point is kept firmly in mind, societies of all kinds will become nothing but stockpiles of resources coordinated and distributed to individuals. This, in turn, is the justice of a partnership, distributing private shares rather than the justice of a common good to which each member is ordered.

### *Summary*

- The sin of the modern state is the injustice of its claiming a monopoly over group-personhood – reserving what is ‘distinct in dignity’ for itself and for individual persons. The Catholic position holds that the political sovereign is limited by the very existence of real group persons, of which the state (or polity) is not an exception. A normal society, then, will evince a multiplication of authorities embedded in group persons.
- Unlike the devolution position(s), subsidiarity is not a policy decision whether there ought to be social pluralism. Subsidiarity depends upon there already being a plurality of group-persons. Take away social plurality and there is nothing that can correspond to the principle of subsidiarity. Devolution, when prudentially called for, is a policy, not the principle, of social unity and diversity. Decentralization might be compatible with, or even advantageous to, subsidiarity; but they should not be confused. In certain cases, decentralization can amount to the same thing as subsidiarity, particularly in polities enjoying a federal system in which the ‘states’ (provinces) have a specifically social and political identity – that is to say, where the ‘states’ are something more than merely convenient administrative units of the polity. Issues of decentralization will depend not only on the living social identity of the ‘states’ but also upon the juridical organization of the constitution. In such cases, there is ordinarily a constitutional law governing the association of these federated polities. However, where the constitution leaves room for prudential policies, the principle of subsidiarity will dictate, very generally, that when the central or national polity either intervenes in the political life of the ‘states’, or when it for reasons of policy devolves or decentralizes on a particular scope of issues, it should not subvert the polity and sociality of the ‘states’. It is important to note that although

subsidiarity is usually invoked in the case of a larger or superior society helping a lower one, in our age of devolution out-sourcing of power or responsibilities to smaller social units can create great burdens on the lower societies. Not every devolution or decentralization protects social pluralism. For example, in American politics we speak of “unfunded mandates”, by which the U.S. government forces its own burdens downward to the states and municipalities without adequate funding’.

- Subsidiarity requires the just treatment of self-governing societies. Since every society seeks not only to achieve certain ends, but also to pursue those ends in their own mode of unity, it is to no avail to argue that some other power can get the job done better or more efficiently. Societies have their own internal agency. Therefore, if aid is to be given to a society, it must be done in such a way that preserves the sociality of the group being assisted.
- Yet there is nothing in the nature of a particular society that makes it incapable of being ordered (and ordering itself) to a wider society. Just as individuals must be right with their neighbor, so too must group-persons be right with other group-persons. If a plurality of group persons is natural, so too is political order in which a number of societies enjoy a common order. And if political order is natural, so too is international order. In each case, we find a diverse ‘whole’ referred once again to a wider common good. The virtue that brings about that wider order is called social justice.
- Because social justice is bringing actions (of individuals and groups) into harmony with a wider common good, it should not be confused with distributive justice lest we fall into the trap of dividing and distributing something common. However, it is permissible to say that a society, of whatever magnitude, will distribute common utilities. In this sense, social justice does involve distribution. Even so, when a state makes available free legal counsel to the indigent, we do not say that the rule of law is distributed to private persons. When the international order distributes resources for the development of peoples, the resources are distributed, not the international order itself.

## V. CONCLUSION

Hence, we have arrived at the coherence of the four principles. There are natural persons and group-persons. In different ways, each is distinct in

dignity, possessing rights and responsibilities. The human tendency to 'dwell in society', to use Pope Leo's words, cannot be exhausted by membership in a single group. It is not the accidental forces of society and history that alone account for the diversity of group persons, but rather human nature itself. Solidarity is never a single thing, but a multitude of relations. On these facts, subsidiarity counts as an authentic principle of social life. When one power assists another, it must not subvert the solidarity of the group. These particular groups, in turn, need the virtue of ordering themselves in harmony with others, and thus is brought into existence the common good called polity. The ordering of members to a society, and of societies to still wider societies, is called social justice.

The foregoing exposition would seem to be a rather neat picture of the four basic principles. I am fairly confident that I have given an accurate presentation of what they originally meant, and how they are supposed to be configured to one another. In sum, they affirm a *principled pluralism* that respects the rights of individuals in their own dignity, and in their membership within various groups. The principles were never meant to be anything like an 'ideal' model proposed by some 19th century sociologists, much less from 20th century economists.

At the same time, we must admit that our exposition is philosophical. It is complete only in the sense that the principles of any architecture are complete. Nothing can be built or achieved without returning to the concrete terrain of social reality. Here, a philosopher is not the best guide. Even so, I shall offer a few concluding observations.

Let us assume, for the sake of argument, that we have a correct and coherent understanding of the four basic principles, and that we are prepared to apply them to the concrete social, economic, and political world. The first thing that must be conceded is that social change comes not only from impersonal forces, but also from a myriad of decisions and adjustments made by individuals within communities. For example, no impersonal force of history was solely responsible for the fact that, in most of the western societies, family is regarded as the so-called nuclear family rather than an extended network of uncles and aunts and cousins. Nor did anyone dictate by law that, in Catholic life, a god-parent usually denotes a liturgical rather than an ordinary social function. Because social relations and offices change through the medium of free adaptation, it is the beginning of wisdom to understand that they cannot be changed easily by dictates from on high (of law, social policy, etc.). To be sure, 'things' can be organized and reorganized by public policy; but this

does not necessarily bring about a social change. The current predicament in Iraq would be the case in point.

Moreover, the social changes with which we must reckon are not uniform. Among some peoples, we see a chronic inability to achieve a common good that transcends tribes, if not organized gangs. They have not achieved the order of polity, and they do not have the luxury of worrying about subsidiarity. Still other peoples have a toe-hold on political order, but lack the utilities for *vivere bene*, the good life. Without polity, and without adequate utilities, the most rudimentary aspects of social harmony (domestically and internationally) are precarious, to say the least.

Our history in western societies, however, is marked by the achievement of political order in the state and by the achievement of affluence, which depended to a considerable extent upon the nation-state. This particular political 'form' called the nation-state was the engine for the development of modern science and technology international trade, mandatory education, and the rule of law as we understand it today. But the nation-states and their economies and wars made it difficult for traditional, subsidiary societies to flourish. States used the very awkward legal principles of concession and fiction to situate sub-political societies within the nation-state. Until the 1960s, when the issue of developing peoples became pressing, Catholic social doctrine was formed almost entirely in response to the achievements, but more often, to the problems of relatively advanced western peoples. This doctrine could take it for granted that these peoples had political order (though much too strong and all-encompassing) and subsidiary societies (which had to struggle for recognition within the nation-state).

To my knowledge, no institution sounded such an early and persistent warning about the state as *Volkskörper* (a nation body) than the Catholic Church. Catholic thought de-substantialized the state in favor of the idea of societies as unities of order. Now, however, we must ask what happens when this modern, omnicompetent state dwindles in authority? This, in fact, was the question posed by John Paul II in *Centesimus annus*. With the passing of the totalitarian regimes, would society move in the opposite direction, reconstituting itself as a set of market-like relations?

Of the many things which have changed in our life-time, the most notable is the fact that the western nation states are not interested in actively persecuting or legally incapacitating associational life – nothing, at least, on the scale of the pre-1945 regimes, and in central and eastern Europe the pre-1989 regimes. Indeed, governments are very reluctant to enforce a 'public' morality, preferring instead to leave strong moral notions to the private sphere. Popes from Leo XIII through Pius XII would hardly recognize such



a diminished ambition on the part of governments. Think for example of Bismarck, Gladstone, and Teddy Roosevelt, and then think of the current crop of political leaders who are more liable to apologize for any notion that the state should be a primary object of loyalty, much less an agent for civilizing the world. Cardinal Ratzinger's remark about the 'dictatorship of relativism' applies to this new reality, to societies which are diffident about any assertions of moral order.

The Protestant theologian Karl Barth referred to the post-1945 west as a society of 'disillusioned sovereignty'.<sup>85</sup> Peoples wanted their nation-states to be more friendly to private life, less belligerent, and more of a coordinating device for enhancing life-styles. Especially in our time of globalization, it becomes quite easy to imagine a good life based upon what Ernest Gellner calls the loose and revocable associations of 'modular man'. Nowhere does this manifest itself more strongly than in matrimonial and familial societies, which tend to function in the manner of partnerships. In a recent case about gay marriage that came before the California Supreme Court (Mar. 5, 2008), members of the Court expressed astonishment that anyone would worry about the words 'marriage' or 'partnership' so long as individuals are legally free to have their own relationship.

Finally, I conclude with an empirical question. How is the preference for loose associations related to the decline of the moral authority of the state? The great hope of Catholic social doctrine was that, once the state is properly limited, we would see a flourishing of other societies and modes of solidarity. But it is not evident that this happened, or that it is about to happen any time soon. What is the correlation, if any, between the decline of the nation-state and the rise of partnerships rather than societies?<sup>86</sup> How we situate the principles of solidarity and subsidiarity today will depend upon how we answer this question.

<sup>85</sup> *Church Dogmatics*, Vol. III part IV (German 467, English 410).

<sup>86</sup> We are witnessing, what Pierre Manent has dubbed 'culture without borders'. Markets, globalized communications, and the international aspiration for the rights of man can make polity a bit player on the stage of human happiness.

'Commerce, right, morality: these are the three systems, the three empires that promise the exit from the political. Each in its own form: commerce, according to the realism, the prosaic character of interests rightly understood; right, according to the intellectual coherence of a network of rights rigorously deduced from individual autonomy; and finally, morality, according to the sublime aim of pure human dignity to which one is joined by the purely spiritual sentiment of respect'.

Pierre Manent, *A World beyond Politics? A Defense of the Nation-State*. Trans. Marc LePain. Princeton University Press, 2006.