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NICHOLAS ARONEY
AND
IAN LEIGH

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Contributors

Nicholas Aroney is Professor of Constitutional Law at the University of Queensland School of Law and an Affiliated Faculty Member of the Center for the Study of Law and Religion at Emory University School of Law.

Iain T. Benson is a Professor of Law at the University of Notre Dame Australia, Sydney Law School and Extraordinary Professor, University of the Free State, Bloemfontein.

Carlos Bernal is a former Judge of the Constitutional Court of Colombia and a Professor of Law at the University of Dayton School of Law.

Dorothea H. Bertschmann is a Tutorial Fellow of the College of the Resurrection, Mirfield, and an Honorary Fellow in the Department of Theology and Religion at Durham University.

Jonathan Burnside is a Professor of Biblical Law at the University of Bristol Law School.

Jonathan Chaplin is a member of the Centre for Faith in Public Life at Wesley House, Cambridge, and of the Divinity Faculty, University of Cambridge.

Richard Ekins is Professor of Law and Constitutional Government in the University of Oxford.

Douglas Farrow is a Professor of Theology and Ethics, McGill University.

Joel Harrison is a Senior Lecturer at Sydney Law School, University of Sydney.

R. H. Helmholz is the Ruth Wyatt Rosenson Distinguished Service Professor of Law at the University of Chicago Law School.

Mary M. Keys is an Associate Professor in the Department of Political Studies at the University of Notre Dame.

Ian Leigh is an Emeritus Professor of Law at Durham University.

Peter J. Leithart is a President of the Theopolis Institute for Biblical, Liturgical, and Cultural Studies in Birmingham, Alabama.

Joan Lockwood O'Donovan is an Honorary Reader at the University of St. Andrews School of Divinity.

David McIlroy is a Barrister at Forum Chambers; a Visiting Professor, Centre for Commercial Law Studies, Queen Mary University of London; and a Visiting Professor, University of Notre Dame (USA) in England.

John Milbank is an Emeritus Professor at the University of Nottingham Department of Theology and Religious Studies.

Colleen E. Mitchell is a Postdoctoral Research Fellow, Princeton University.

Julian Rivers is a Professor of Jurisprudence at the University of Bristol Law School.

Tracey Rowland holds the John Paul II Chair of Theology at the University of Notre Dame Australia.

Li-ann Thio is Provost Chair Professor of Law at the National University of Singapore Faculty of Law.

David VanDrunen is Robert B. Strimple Professor of Systematic Theology and Christian Ethics at Westminster Seminary, California.

John Witte Jr. is Robert W. Woodruff Professor of Law, Alonzo L. McDonald Distinguished Professor, and Director of the Center for the Study of Law and Religion at Emory University School of Law.

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Subsidiarity

Origins and Contemporary Aspects

Iain T. Benson[1]

Introduction

This chapter discusses the nature and ongoing relevance of the principle of subsidiarity in constitutional law. Subsidiarity is, in brief, an organizing principle. The Latin term subsidium (literally: help or aid) underlies the concept, which states that as much as possible matters should be organized in ways so that the larger aspects of a society (nation, state, etc.) assist the local, the smaller, and the more personal aspects (persons, families, associations, etc.) to undertake their proper functions. As a consequence, subsidiarity furthers diversity rather than homogeneity and the local rather than the distant. The justification for this ordering is so that the smaller aspects are enabled to realize those ends that are proper to their true natures rather than being submerged or interfered with unduly by the larger powers surrounding them. The principle is found in Aristotle but was developed principally in Roman Catholic social philosophy. The idea is derived not from anthropology but from the nature of human society. Aristotle noted that the city is naturally composed of certain natural groupings—families, tribes, associations, neighborhoods, villages—and that these groupings are sufficient for some tasks but not for others.[2] The city may assist the smaller by giving them what they need to survive and achieve their goals. The social doctrine of the Catholic Church has given increasing attention to subsidiarity, and

[1] The author acknowledges Nicholas Aroney and Ian Leigh, and Russell Hittinger, Mary Ann Glendon, Bradley Miller, Peter Lauwers, Shaun de Freitas, Shann Turnbull, Jamie Hardigg, Steven Lovell-Jones, and Peter Williams. He also acknowledges, with thanks, the Small Circle Philosopher's Group and, in particular, Christo Lombaard (Pretoria) and Kristof Vanhoutte (Paris Institute for Critical Thinking).

[2] *Politics*, 1252 b 10–29.

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analogous ideas have been developed within Protestant thought, as will be discussed in this chapter.[3]

Recent work shows that subsidiarity principles are relevant across diverse areas of contemporary culture. A partial list would include federalism,[4] globalization, environment sustainability, elder care,[5] corporate governance,[6] localism,[7] economic and monetary reform,[8] and greater civil society involvement in constitutional development.[9] Subsidiarity, grasped in its fullness, is more than de-centralization since it is concerned particularly with matters at their proper level, not simply their "smaller" level (as is sometimes stated erroneously).

This chapter consists of five substantial parts. The first part reviews important definitions and conceptual frames in contemporary culture relevant to our thinking about subsidiarity. The second part deals with some of the background and origins of subsidiarity in classical and other historical and theological contexts. The third part discusses civil society and related notions as a specific nexus for subsidiarity. The fourth part turns to key related concepts and several questionable distinctions that pose challenges to applying subsidiarity today. The fifth part discusses, by way of conclusion, conceptions of subsidiarity as furthering either diversity or homogeneity and why moves toward statism increasingly have a "religious" character.

[3] Roland Minnerath, "The Fundamental Principles of Social Doctrine. The Issue of Their Interpretation" in Margaret S Archer and Pierpaolo Donati (eds), *Pursuing the Common Good: How Solidarity and Subsidiarity Can Work Together*, Acta 14, Proceedings of the 14th Plenary Session of the Pontifical Academy of Social Sciences (Pontificia Academia Scientiarum 2008) 45–56, 51–54.

[4] Jacob Deem, Robyn Hollander, and AJ Brown, "Subsidiarity in the Australian Public Sector: Finding Pragmatism in the Principle" (2015) 74(4) Australian Journal of Public Administration 419–434, 432. See also Nicholas Aroney's chapter on "Federalism" in this volume (chapter 15, above).

[5] Lucia A Silecchia, "The When and Where of Love: Subsidiarity as a Framework for Care of the Elderly" in Robert F Cochran Jr and Zachary R Calo (eds), *Agape, Justice and Law: How Might Christian Love Shape Law?* (Cambridge University Press 2017) 209–277.

[6] E.g., Shann Turnbull, "Stakeholder Governance: A Cybernetic and Property Rights Analysis" in RI Tricker (ed), *The History of Management Thought: Corporate Governance* (Ashgate 2000) 401–403.

[7] See *Policy Studies*: Mark Evans, David Marsh, and Gerry Stoker, "Understanding Localism" (2013) 34(4) Policy Studies 401–407.

[8] Elinor Ostrom, "Beyond Markets and States: Polycentric Governance of Complex Economic Systems" <https://www.nobelprize.org/prizes/economic-sciences/2009/ostrom/lecture/> accessed 5 June 2020.

[9] See the section later in this chapter discussing the South African Charter of Religious Rights and Freedoms.

The Nature of Subsidiarity

While the principle of subsidiarity is nondenominational, its conceptual development has occurred mainly within the social thought of the Roman Catholic Church. Put succinctly, subsidiarity provides the framework or organizing principles of a culture, while its sister concept, solidarity, is the moral or ethical principle that operates within that frame. The result of the proper relationship between these two principles—organization and moral content—is then worked out as justice and the common good. Subsidiarity proceeds from an understanding of human beings as persons in relation—in contrast to the "autonomous individuals" of contemporary liberal theory. According to the *Compendium of the Social Doctrine of the Church*, "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good."[10]

Subsidiarity relates to local forms including municipalities, school boards, education, guilds and trade unions, socio-professional groups, associations of a wide variety, and, importantly, the family. It connects directly with wider "civil society" notions as well as to the region, the state, and beyond. The principle has both positive and negative aspects. Positively, it means that all communities should encourage and enable individuals to exercise self-responsibility, with larger communities assisting the smaller. Negatively, communities must not deprive smaller communities or individuals of the opportunity to exercise their own functions. Minnerath notes the importance of "participation," which is defined as the expression of "the equal dignity of each person and of his or her common vocation to deal with the issues concerning him or her."[11] Whereas the common good and solidarity derive from the nature of the person, subsidiarity "arises from the need for good governance" and is a movement that begins from the bottom up, not the top down.[12] As Minnerath notes, the principle "demands the real practice of a democracy of proximity."[13]

[10] *The Compendium of the Social Doctrine of the Church* (Editrice Vaticana 2009) para. 433, 187ff.; see also Pope Pius XI, *Quadragesimo Anno* (15 May 1931) para 79; Pope John XIII, *Pacem in Terris* (11 April 1963) para 140–141 (the universal authority securing the proper function of local public authorities); J Messner, *Social Ethics: Natural Law in the Modern World* (JJ Doherty tr, B. Herder Book Co. 1949) 196ff. Subsidiarity overlaps with notions of sovereignty and federalism: see chapters 9 and 15 by Harrison and Aroney, respectively, in this volume.

[11] *Politics*, 1252 b 51.

[12] Ibid, 56.

[13] Ibid, 53.

Subsidiarity is a *check* on command and control hierarchies, not a *block*: the state still has its proper function.[14] The larger and smaller dimensions of a culture have their proper roles, which may include horizontal and vertical relations. Statist approaches that favor the highest level of control are antithetical to the spirit of subsidiarity but consistent with Marxist-Leninism and socialism.[15] Chiliastic socialist societies throughout history have subverted private property, religion, and the family to centralize power.[16] Hittinger calls subsidiarity "the deepest and most searching element in modern Catholic social thought."[17]

Protestant and classical thinkers have developed similar notions to the Roman Catholic doctrine of subsidiarity, and contemporary scholarship shows an increasing interest in the relevance of the concept.[18] The varied and different ways in which Roman Catholic and Protestant theology embrace or reject philosophy, while important to consideration or rejection of subsidiarity, are beyond the scope of this chapter.[19]

Protestant writer Johannes Althusius (1557–1638) understood that all social union is both federal and covenantal, creating a single pluralistic order of intersecting covenantal associations including "simple" or "private"

[14] See *Compendium of the Social Doctrine of the Church*, para 188. State intervention to "create conditions of greater, equality, justice and peace," as long as necessary and only in relation to the situation's *exceptional* nature, may be advisable.

[15] Igor Shafarevich, *The Socialist Phenomenon* (Harper & Row 1980) 269. On communist strategy with respect to associations see Sheila Fitzpatrick, *The Commissariat of the Enlightenment: Soviet Organization of Education and the Arts under Lunarcharsky* (Cambridge University Press 1970) 227ff.

[16] Karl Marx criticized individualism under capitalism. See Shlomo Avineri, *The Social and Political Thought of Karl Marx* (Cambridge University Press 1968) 33, 84–95. Pope Leo XIII in his influential encyclical *Rerum Novarum* (On the Condition of the Working Classes) (1891) noted the problems of scale in relation to both socialism and capitalism, and the importance of the protection of family life and the property of private societies and associations (paras 9, 38–40).

[17] Russell Hittinger, "Social Pluralism and Subsidiarity in Catholic Social Doctrine" (2002) 16 *Annales Theologici* 385, 407; *Catechism*, para 1884.

[18] Jonathan Chaplin, "Subsidiarity as a Political Norm" in Jonathan Chaplin and Paul Marshall (eds), *Political Theory and Christian Vision* (University Press of America 1994); Jonathan Chaplin, "Subsidiarity and Social Pluralism" in M Evans and A Zimmerman (eds), *Global Perspectives on Subsidiarity, Ius Gentium: Comparative Perspectives on Law and Justice* (Springer 2014) 65–83; D McIlroy, "Subsidiarity and Sphere Sovereignty: Christian Reflections on the Size, Shape and Scope of Government" (2003) 45 Journal of Church and State 739; Rex Ahdar and Ian Leigh, *Religious Freedom on the Liberal State* (2nd edn, OUP 2013) 110ff.; Norman Doe, *Christian Law: Contemporary Principles* (CUP 2013) 346ff.

[19] From a Catholic perspective: Thomas Gilby, *Between Community and Society: A Philosophy and Theology of the State* (Longmans 1953); from a Protestant perspective: Emil Brunner, *Justice and the Social Order* (Mary Hottinger tr, Lutterworth Press 1945); and from an Eastern Orthodox perspective: Cyril Hovorun, *Political Orthodoxies: The Unorthodoxies of the Church Coerced* (Fortress Press 2018).

associations (family and collegium) and "mixed" or "public" associations (city, province, and commonwealth).[20] Scholars have also addressed Neo-Calvinism and Catholicism in relation to the Protestant concept of sphere sovereignty and the relation between Church and state post–Vatican II within the Roman Catholic context.[21]

James W. Skillen and Rockne M. McCarthy expressed concerns about the Catholic approach to the incorporation of Greek thought, particularly teleology, and the relationship between grace and nature and what they saw as a tendency toward individualism.[22] These concerns have been addressed by Catholic scholar Russell Hittinger, who notes that the theme of *munera* in Catholic thought is similar to "sphere sovereignty."[23] Hittinger explains the difference between Catholic and "liberal discourse" in which the Catholic was suspicious of the market model of social pluralism and focused on the intrinsic importance of social forms (family, private school, churches, labor unions), whereas the liberal saw society principally in instrumental ways (power checking power).[24]

Subsidiarity, says Hittinger, does not tell us who has which function or *munus*. One has to look elsewhere, that is, to natural positive or divine law.[25] He then makes four important observations: first, the principle does not require action at the "lowest possible level" but, rather, at the "proper level"; second, no deficiency in the person or office is implied by receipt of the subsidium; third, sometimes real deficiencies (such as a family breakdown) require another power to assist; and fourth, the principle does not of itself constitute a social ontology—rather, the *esse proprium* of each office or institution is presupposed and should not be usurped.

[20] Thomas O Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Wilfred Laurier University Press 1999) 152–168. On dignity in Althusius's writings and its tie with subsidiarity, see Nicholas Aroney, "The Social Ontology of Human Dignity" in Angus JL Menuge and Barry W Bussey (eds), *The Inherence of Human Dignity: Foundations of Human Dignity* (Anthem 2021) vol 1, 165–183, 175–178.

[21] David T Koyzis "Persuaded, Not Commanded: Neo-Calvinism, *Dignitatus Humanae*, and Religious Freedom" in Kenneth L Grasso and Robert P Hunt (eds), *Religious Freedom: Contemporary Reflections on Vatican II's Declaration on Religious Liberty* (Rowman & Littlefield 2006) 115–133.

[22] James W Skillen and Rockne M McCarthy (eds), "In Critique of Subsidiarity and Autonomy" in *Political Order and the Plural Structure of Society* (Scholar's Press 1991) 382ff.

[23] Russell Hittinger, "Social Pluralism and Subsidiarity in Catholic Social Doctrine" (2002) 16 Annales Theologici 385, 397.

[24] Ibid, 388. Hittinger states that "the idea of *munus* hold[s] together the Aristotelean notion of an *ergon* or characteristic function . . .with the more biblical concept of vocation or mission" (392). See also, Joel Harrison's discussion of plurality in chapter 9 above on "Sovereignty."

[25] Ibid, 395.

These *munera* include the prior rights of family, children, the Church, its seminaries, schools, and charitable organizations, and these provide "the teleological and social framework for the juridical conception of rights."[26] Many of the problematic characteristics of the modern state that have emerged over the last four centuries emerge precisely because powers have been abstracted from the inner nature of the *munera*.

Hittinger notes that *regalitas* (the quality or property of ruling) "is embedded within the structure of human personality"[27] and, quoting *Christofidelis Laici* (1988), notes: "the lay faithful participate . . . in the threefold *munus* of Christ as Priest, Prophet and King."[28]

Historical Origins of Subsidiarity

Subsidiarity has its roots in a particular holistic understanding of nature in which parts are necessarily related to the whole. Along with the related concept of solidarity, both emerge from an understanding of the cosmos as a governed order, the purpose of which can be identified by natural reason observing nature. The concept of subsidiarity must thus be understood as a form and dimension of "natural law" thinking. All human persons as well as human culture and society share a common nature and inherent purposes. To recognize what is good for a person or society, one has to understand how good is assessed. Determining whether a thing (law, concept, institution, practice, etc.) is "fit for purpose" requires relating techné (skills or art—the questions of "how") to telos (the end or purpose of the thing—the question of "why"). Law and politics have the purpose of furthering what is ultimately justice for people and this, within Catholic social thought, relates the organizing principle of subsidiarity with the anthropological and moral understanding of solidarity, which, working together, produce justice and the common good.

At the center of the Catholic social doctrine is the conception of the dignity of the human person and the necessary sociality of human beings. Minnerath tells us this doctrine is inspired by biblical anthropology and the theology of

[26] Ibid, 396–397.
[27] Ibid, 399
[28] *Christifidelis Laici*, Apost Exhort (30 December 1988) para 14; AAs/81 (1989), 410, Enchiridion Vaticanum vol 11, 1050, Hittinger, "Social Pluralism and Subsidiarity in Catholic Social Doctrine" 405.

creation and certain categories drawn from Graeco-Roman thought. Legal positivism and individualism have led to a drifting in interpretations of dignity, common good, solidarity, and subsidiarity that, because the four social virtues of "freedom, truth, justice and solidarity" are not met, lead in the direction of oppression and anarchy.[29]

For Aristotle, man was a *zoon politikon*,[30] a social and political animal endowed with reason. Nicholas Aroney notes that Aristotle's city-state (*polis*) is a composition of two smaller categories of community: the household (*oikia*) and the village (*kome*).[31] Life within the *polis* requires a common perception of the good—or what Aristotle called *sunaisthesis*.[32] Differing from the centralized vision of Plato,[33] Aristotle opposed an extreme unification of the *polis*.

Aquinas developed the idea of differing communities and set out a wider range of private and public forms of human associations and government. He distinguished "public societies" such as cities, provinces, and kingdoms from "private societies" such as households, business partnerships, craft guilds, and religious associations[34] and noted that the tyrant deliberately undermines all forms of social solidarity among subjects and prevents them from joining or enjoying the fruits of various compacts and associations (*confederationes*) from which social friendship, familiarity, and trust are generated.[35]

Aroney observes that the common good has distinctively political dimensions that both John Finnis and Aquinas refer to as the "public good." An encompassing common good is not the same thing as the "public good" and must be limited, and the state should not attempt to enact the wider

[29] Minnerath, "The Fundamental Principles of Social Doctrine," 49.

[30] *Nichomachean Ethics*, 1097b. See also Kung Chuan Hsiao, *Political Pluralism* (Harcourt, Brace & Co. 1927), which reviews Aristotle's notion of sociality and then calls for "a revival of the ethical-teleological viewpoint" (247).

[31] *Politics*, I.1–2. See also Nicholas Aroney, "Subsidiarity in the Writings of Aristotle and Aquinas" in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer Dordrecht 2014). Aroney notes that a "household" was broader and had "an emphasis very different from the close marital, parental and filial bonds with which we associate the family today" (13).

[32] John von Heyking, *The Form of Politics: Aristotle and Plato on Friendship* (McGill-Queens University Press 2016) xiii.

[33] *Republic*, V, 449a–466d.

[34] *De Regno*, I 4.7.27; *Republic*, V, 449a–466d. Aroney gives the biblical background for Aquinas's categorizations and notes the nation of Israel was formed out of a plurality of tribes, clans, and families (ST, I-II, 105.1 res, citing Exodus 18:21 and Deuteronomy 1:13, 15). See further Aroney's chapter on "Federalism" in this volume (chapter 15 above).

[35] Nicholas Aroney, "Subsidiarity in the Writings of Aristotle and Aquinas" in M. Evans and A. Zimmermann (eds.), *Global Perspectives on Subsidiarity* (Springer Netherlands, 2014) 9–27, 22.

notion. The external conditions should allow individuals, families, and associations to contribute but should not subject them to an unlimited public authority.[36] While the framework is hierarchical, it includes a wide diversity of jurisdictions that should be properly understood not merely in terms of subordinacy, but as coordinate in relation to specific capacities, each of which have their own jurisdictions that should be respected. Aroney notes, "None of this appears in any of Aristotle's extant writings."[37]

Civil Society, Guilds, Associations, and Local and Informal Rule

Ordering is involved in all human systems (law and politics) whether or not it is acknowledged. The hierarchical aspect means that wherever sovereignty is recognized, the scope and nature of its powers will be present and regulated by law or custom, expressly or implicitly. The term "recognized" here is important because law often recognizes what it does not create and various matters are properly understood as "prior to law" such as liberty itself, the family, friendship, and in most cases religion.

The ideas of civil society, associations, and what we might term "local governance" are important related background notions in any discussion of subsidiarity. Each category may be understood as forms either of homogeneity or of diversity. If we conceive of human beings as parts of a whole merely, without associational or mediating aspects, then we will miss the importance of diversity. On the other hand, if we view human beings as merely individuals, then the question of what binds them together becomes pressing. Both civil society and local governance raise questions of how human beings relate and whether life is viewed as organic or as technological, quantitative, and mechanistic. Civil society and devolved local governance emerge out of conceptions of society that give a preference to the organic and diverse rather than the mechanistic and homogenous.

[36] Ibid, 24, citing John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford University Press 1998) 236–237 and n80.

[37] Aroney, "Subsidiarity in the Writings of Aristotle and Aquinas," 22.

Local Governance

The nature and scope of local governance is a live issue today and takes us back to first principles spanning millennia.[38] Elliot and Bailey argue that local government can only occur (or reoccur) properly if "the relevant actors come to see interference in local affairs as improper" and that "the autonomy of local government [needs to be] substantially augmented."[39]

Recent legislation in Scotland, passed unanimously, and which is intended to import the European Charter of Local Self-Government into Scots Law,[40] shows that the issue of local government is very much alive in Britain at the moment. The charter is an international treaty of the Council of Europe signed by the United Kingdom in 1997. It is designed to advance local authorities' governance and finances to the local level as much as possible according to law. The term "subsidiarity" does not appear in the charter's preamble or substantive provisions, but the principle's spirit is there and its adoption by the Council of Europe suggests it has both popularity and continuing relevance alongside the disaffection occasioned by lack of local accountability that has developed over time.

Civil Society, Guilds, and Towns

For Charles Taylor, civil society is "a web of autonomous associations, independent of the state, which [bind] citizens together in matters of common concern, and by their mere existence or action [can] have an effect on public policy."[41] The nexus of families, groups, neighborhoods, and associations that make up civil society was neither foreseen nor planned by anyone; the social is prior to but intimately and organically related to organizing structures that

[38] See Ian Leigh, "The Changing Nature of the Local State" in J Jowell, D Oliver, and C O'Cinneide (eds), *The Changing Constitution* (8th edn, Oxford University Press 2015).

[39] M Elliot and S Bailey, "Taking Local Government Seriously" (2009) 68 Cambridge LJ 436–472, 472.

[40] European Charter of Local Self-Government (Incorporation) (Scotland) Bill (SP Bill 70) introduced into the Scottish Parliament 5 May 2020. The charter says that public responsibilities "shall generally be exercised, in preference, by those authorities which are closest to the citizen" Council of Europe, Article 4(3) of the European Charter of Local Self-Government, Strasbourg, 15. X. 1985, European Treaty Series No 122. <https://archive2021.parliament.scot/parliamentarybusiness/currentcommittees/115604.aspx> accessed 10 May 2021.

[41] Charles Taylor, "Invoking Civil Society" in *Philosophical Arguments* (Harvard University Press 1995) 204–224, 204.

order relationships with or without law.[42] A recognition of "the autonomy of spheres" makes for a greater sharing of social goods than any other conceivable arrangement and its absence would constitute, in fact, the missing dimension of sociality.

All these views contradict theorists who view social institutions as "constructions" furthering a mechanistic and abstract rather than organic and actual conception of culture.[43] Families are shaped by public law, but that does not mean that they are "socially constructed.[44] Theologically, this might be further understood by saying that one cannot love "humanity, only one's family, friends, neighbors, or persons with whom one has contact. Put this way, the interaction between principles of religion, associations, and theories of ordering (including constitutions themselves) becomes apparent. While these dimensions are prior to the state, the law necessarily meets and intersects with them. Where secularism, understood as an anti-religious ideology, is dominant, then religion and civil society in relation to religion will tend to be disregarded. On the other hand, where religion matters and is understood to be important, the place of religious tradition and associations will call for an approach to constitutional law that is more respectful of that importance.

Historically the powers of local rulers were not always, or even primarily, thought of as legislative: many rules pertaining to work or charity emanated from what we would now refer to as "nongovernmental" bodies. What is at issue is what counts as "law," and it is important to recall that law was not historically and is not even now only or always what emanates from judges and formal legislative chambers. Both historically and in contemporary constitutionalism there is scope for laws or rules to develop, in a sense, extralegislatively. In both England and the United States towns and other groupings, such as guilds, had considerable rule and lawmaking ability at different points in history. This can only be discussed here in broad-brush

[42] James Q Wilson, *The Moral Sense* (Free Press 1993) 246; Michael Walzer, *Spheres of Justice* (Basil Blackwell 1983) 321; and Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1991) 109–144.

[43] See John Ehrenberg, *Civil Society: The Critical History of an Idea* (New York University Press 1999) 109ff and Augustus Pulszky, *The Theory of Law and Civil Society* (T Fisher Unwin 1888) 232–235, tracing the "organic" versus "mechanistic" visions of society back to the Greeks.

[44] William Galston, "Religion and Limits" in Douglas Farrow (ed), *Recognizing Religion in a Secular Society* (McGill-Queens 2004) 41, 47, See, on the problems of assuming "construction" rather than inherency, Iain T Benson, "Getting Religion and Belief Wrong by Definition: A Response to Sullivan and Hurd" in Iain T Benson, Michael Quinlan, and A Keith Thompson (eds), *Religious Freedom in Australia: A New Terra Nullius?* (Shepherd Street Press/Connor Court 2019) 332–358.

fashion, but both commerce and charities were, for centuries, governed not by the sovereign or larger legislative bodies but by towns, guilds, or charters crafted by civil society groups.[45] Whereas the state in the Middle Ages had concerned itself with military protection and the administration of the law, leaving trade regulation and charities such as hospitals largely to religion and the guilds, following the reign of Henry VIII the state "made itself responsible for the religious life of the people [and] now began to concern itself with the promotion of industry and commerce."[46]

The relationship between the sovereign and the people as it involved the election of aldermen (before the earliest election of members of Parliament) is described in detail as an aspect of "the complete independence of administration" exercised by, for example, the weaver's guild in relation to rights they exercised in "holding courts, trying offenders, enforcing their sentences and assuming as they did, complete independence of administration."[47] Law as we understand it now was not the rule.

In a survey of the charters of towns, cities, and states in colonial and post-revolutionary America, Amasa Eaton described an "overlooked history" that contradicts the received view that the towns and cities were "the creatures of the legislature and subject to their will," noting that scope existed to make laws distinct from the constitution of the states within which they were situated.[48]

The South African Charter of Religious Rights and Freedoms: A Civil Society Charter

That contemporary law has the capacity to return to an alternative way of imaging law is evidenced in an interesting provision of the South African Constitution. Given the essentially one-party character of the South African state (the ruling African National Congress Party having an apparently unassailable majority position in national elections since the end of Apartheid

[45] The medieval guild "established a complete system of industrial control . . . in pursuit of a common calling and . . . enveloped the life of the Medieval craftsman in a network of restrictions which bound him hand and foot." See AJ Penty, *A Guildsman's Interpretation of History* (George Allen & Unwin 1920) 38.

[46] Ibid, 228.

[47] William Stubbs, *The Constitutional History of England* (Clarendon Press 1880) vol III, 619.

[48] Amasa M Eaton, "The Right to Local Self-Government" (February 1900) XIII(6) Harvard Law Review 58, 138.

in the 1990s), the Constitution of the Republic of South Africa of 1996 introduced an innovative provision, Section 234.[49] This provision allows for the creation of "additional Charters of Rights" that emerge from civil society rather than through the usual mechanisms of courts and Parliament. It was long imagined that the first use of this provision might be, and so it turned out, the creation of a South African Charter of Religious Rights and Freedoms. The charter was eventually signed by representatives of all the major religions and many nongovernmental organizations at a public meeting in Johannesburg, South Africa, in October 2010 attended by the deputy chief justice of the constitutional court, a university chancellor, and with greetings brought from the Canadian Senate. One might ask: what exactly is the charter in terms of traditional contemporary legal thinking?

Despite the fact that it has yet to be adopted formally, the charter is being used by legal counsel in cases touching upon the panoply of rights it describes and by religious bodies themselves to teach how religions understand the provisions touching on state-religion relations in South Africa. Its provisions on matters such as parental rights in education, the relationship between the state and the religions, respect for conscience and religion in health care, access to traditional lands, fair access to the media by minority groups, etc., were framed *from the perspective* of the signatory religions and nongovernmental institutions.[50] This acknowledgment that civil society institutions might play an important role in the articulation of fundamental constitutional principles represents a new way (or, perhaps, a return to old ways) of thinking about the traditional difference between the "ascending" and "descending" theories of sovereign power (and therefore law).[51] To date, the charter represents the only use of Section 234 and its ultimate influence

[49] Section 234 of the Constitution of the Republic of South Africa 1996 reads: "234. Charters of Rights: In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution."

[50] The South African Charter of Religious Rights and Freedoms may be found here: <https://www.strasbourgconsortium.org/content/blurb/files/South%20African%20Charter.pdf>. For the process and background to the charter see Iain T Benson, "The South African Charter of Religious Rights and Freedoms" (2011) 4 (1) International Journal of Religious Freedom 125–134. The writer was one of the principal drafters of the charter. See also Pieter Coertzen, "Constitution, Charter and Religions in South Africa" (2014) 1 AHRLJ 8 and Rassie Malherbe, "The Background and Context of the Proposed South African Charter of Religious Rights and Freedoms" (2011) BYU L Rev 612–636. The original intention of the framers was to take the charter to the government for passage, but on later consideration it was decided that to do so would endanger its status and integrity as a "civil society" document, so that course was abandoned as ill-advised. Section 234 speaks, after all, of "adoption," not passage by law in the usual sense.

[51] See Patrick Parkinson, *Tradition and Change in Australian Law* (5th edn, Thomson Reuters 2013) 98–99.

remains to be seen. There is no reason that such "citizen charters" could not be developed in other countries as a means of developing new kinds of "law beyond law" to address emergent issues.[52]

Contemporary Concepts or Movements that Further or Inhibit Subsidiarity within Constitutionalism

The concepts discussed previously are undercut by many contemporary currents and various conceptual shifts that have changed how we think about persons, communities, and the state. Subsidiarity's focus on the dignity of the person implies a criticism of any concept of a citizen understood as an isolated individual who is not socially integrated or that is swallowed up on a homogeneous agglomeration. Related to this is whether organizing principles, such as respect for freedoms of religion and association, tend toward centralization or de-centralization, to community or individualistic atomism. Charles Taylor confirms that Aristotle's subsidiarity is consistent with personalism and inconsistent with individualism.[53] In a similar manner, what sort of structuring model for society is imagined then instantiated in law is critical to whether there is scope for subsidiarity to emerge practically or whether our conceptions of law and the state will interfere with more organic and holistic conceptions.

As mentioned earlier, Charles Taylor described two main structuring models: civil society or some variant of "Marxist-Leninist vanguard-party"

[52] A competing view of the use of the constitution embraces "transformational constitutionalism." This, without due attention to subsidiarity principles, would lead to the hypertrophy of law discussed later in this chapter. Propounding this approach to the constitution is Karl Klare, "Legal Culture and Transformational Constitutionalism" (1998) 14 SAJHR 155. Responding with a concern about "legal authoritarianism," see Theunis Roux "How, When and Why Does Faith in Law's Autonomy From Politics Decline? A Comparative Constitutional-Cultural Analysis" [2017] UNSWLRS 16.

[53] Charles Taylor, *Philosophy and the Human Sciences, Philosophical Papers, 2* (Cambridge University Press 1985) 187–210, asks why "we even begin to find it reasonable to start political theory with an assertion of individual rights and give these primacy?" (189). On liberalism's wrestle with individualism see Will Kymlicka, *Contemporary Political Philosophy* (Clarendon Press 1990) 216ff and Tracey Rowland's chapter in this volume (chapter 19). See, in relation to Calvin's thought, L Dumont, "Christian Beginnings of Modern Individualism" in Michael Carrithers, Steven Collins, and Steven Lukes (eds), *The Category of the Person: Anthropology, Philosophy, History* (Cambridge University Press 1985) 93–122, and, generally, John MacMurray, *The Self as Agent* (Faber and Faber 1957) and *Persons in Relation* (Faber and Faber 1958), Charles Taylor, *Sources of the Self* (Harvard University Press 2002) and Thomas Langan, *Human Being: A Philosophical Anthropology* (Missouri University Press 2009) 11–12. For sexuality and the "person" see Roger Scruton, *Sexual Desire* (Free Press 1986) 36ff; JB Coates, *The Crisis of the Person: Some Personalist Interpretations* (Longmans, Green and Co. 1949) 235–248; O Carter Snead, "An Anthropological Solution" in *What It Means to Be Human: The Case for the Body in Public Bioethics* (Harvard Univ Press 2020) 65–105.

organization.[54] Emerging in general terms from the latter, contemporary cultural Marxism, now understood as "identity politics," with its rejection of universal human reason and nature, subordinates all aspects of associational life to the interests of the party or the splinter identity group. These reductionist theories show that preoccupation with power relations based on race, sex, sexual orientation, "gender," or abstract "inclusion" leads to what Graham Good has described as a "new sectarianism" that forms a "carceral vision" leading to the betrayal of humanism itself.[55]

Ideas such as a "global civil society" raise questions for the local dimensions of lived communities upon which subsidiarity focuses.[56] William Galston refers to a part's wish to dominate the whole as "civic totalism" and traces three distinct forms in Aristotle, Hobbes, and Rousseau.[57] John Gray discusses pseudo-liberalism that seeks convergence and forces "agreement" rather than a genuine liberalism embodying ongoing toleration, accommodation, and modus vivendi.[58] Civic totalists and convergence advocates oppose genuine diversity as their approaches tend to be homogenizing, statist, or globalist in intent—universal government is framed from the top down. The deployment of terms such as "diversity," "equality/deep equality," "liberalism," or "inclusion" to further convergence or totalism often usurp the accommodation, toleration, and modus vivendi essential to subsidiarity and, as that theory sets out, freedom and liberty themselves.

Nicolas Berdayev notes the state's tendency to reach into autonomous spheres and become totalitarian.[59] In contrast to the Middle Ages, whose conception of common culture was characterized by the idea of organic unity in which every part presupposed the unity of the whole, many contemporary

[54] Taylor, "Invoking Civil Society," 204–205.

[55] Graham Good, *Humanism Betrayed* (McGill-Queens 2001).

[56] For concepts of civil society not favorable to diversity see Ralf Dahrendorf, "Citizenship and Social Class" in Martin Bulmer and Anthony M Rees (eds), *Citizenship Today: The Contemporary Relevance of T. H. Marshall* (Routledge 1996) 25–48. Here, civil society and citizenship are coextensive, ignoring any ongoing modus vivendi and subsidiarity.

[57] William A Galston, "Religion and the Limits of Liberal Democracy" in D Farrow (ed), *Recognizing Religion in a Secular Society* (McGill-Queens 2004) 41–50, 43–44, 49; John Gray, *Two Faces of Liberalism* (New Press 2000) 20–21. See also Peter Lauwers, "Liberal Pluralism and the Challenge of Religious Diversity" in Iain T Benson and Barry W Bussey (eds), *Religion, Liberty and the Jurisdictional Limits of Law* (LexisNexis 2017) 29–63.

[58] Maurice Cowling, *Mill and Liberalism* (Cambridge University Press 1963) xii–xiii notes what Cowling refers to as John Stuart Mill's anti-Christian purpose.

[59] Nicholas Berdayev, *The Realm of Spirit and the Realm of Caesar* (Donald A Lowrie tr, Green Press 1953) 72, 76–77. On communist opposition/hatred of Christianity and its fundamental problem as "the relation between man and society" see Nicholas Berdayev, *The Origin of Russian Communism* (RM French tr, Bles 1937) 191–229, 221ff.

theorists, including some who seem genuinely sympathetic to the place of religions within culture, tend toward a homogeneous conception of the state, expanding its role expressly or impliedly to those dimensions that should be protected from homogenization. This "bleaching out" may sometimes be done under the guise of "neutrality," but when the moves are examined, "such [so-called] state neutrality in respect of religious minorities is only superficial, masking an underlying current which flows in the opposite direction."[60] On this reading, areas of law once considered private are made increasingly subject to state regulation.[61]

Where religion is no longer the background and frame of the culture, the state is compelled to perform the functions of a church (for which by its nature it is radically unfitted) and the distinction between public and private spheres is blurred, resulting in "the crisis of the personal."[62] The persons who wield political power should not have untrammeled authority over the life of religious communities or other associations and their members in part because the private/public distinction is important to protect human rights from challenges emerging from what Jean Bethke Elshtain well described as a "politics of displacement,"[63] which tended to blur conceptual boundaries and eliminate the public/private distinction that, in fact, makes politics possible.[64] William Galston points out that "pluralist politics is a politics of recognition rather than construction. It respects the diverse spheres of human activity; it does not understand itself as creating or constituting those activities."[65]

Certain scholars, for example, in recent works, support common but erroneous or rather sharp divisions between "religion" and "the secular," "constitutionalism and religion," "law and religion," or blended notions such as "constitutional theocracy." In all these cases, a fuller understanding of relationships between law, religion, and society, incorporating the concepts

[60] See Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press 2010) 340–343, and with respect to "neutrality" at 343. See also David L Schindler, *Heart of the World, Centre of the Church* (T&T Clark 1996) 159ff. on liberalism, Catholicism, and neutrality.

[61] Ibid.

[62] This "crisis of the personal" according to John Macmurray, *The Self as Agent* (Faber & Faber 1957) 30–31 "is the crisis of liberalism which was an effort, however ambiguous, to subordinate the functional organization of society to the personal life of its members. . . . The declared intention [of Communism] was to achieve a form of society in which the government of men would give place to the administration of things."

[63] Jean Bethke Elshtain, *Democracy on Trial* (Basic Books 1995) 39–40.

[64] Ibid, 40.

[65] William A Galston, "Religion and the Limits of Liberal Democracy" in D Farrow (ed), *Recognizing Religion in a Secular Society* (McGill-Queens 2004) 41–50, 43–44, 49.

we have seen in subsidiarity, are absent.[66] "Secular," for example, once meant the order of time in contradistinction to eternity, or the time between the departure of Christ and his return; it was not a nonreligious or nonsacred conception—as is evidenced in the Catholic tradition with its references to "secular clergy" and "secular institutes." That it now means for some "nonreligious" or "excluding religion" ought to give pause to those who analyze the proper relations between the public sphere and religious associations. Subsidiarity, with its careful marshaling of concepts, understood historically offers greater clarity around such terms as "belief/unbeliever," "faith," "secular," "secularism," "law," "constitution/constitutionalism," and the "public/private" divide to name but a few.

First, it is important to note that religion, agnosticism, and atheism are differing *belief* systems, all of which are entitled to play an active role within the public sphere and to form properly "public" programs for their followers. Second, religion itself is an *equality* right, and thus a proper analysis of conflicts should be undertaken with respect to the *context* in which they occur and not on the basis of an elevation of one principle (equality or law) over another (religion).[67] It is, however, important not to overlook the importance of religious law and ordering to religious communities as well as three important differences between law and religion as they will coexist in contemporary open societies: (1) religions are voluntarily joined, whereas being subject to the law is not an option; (2) religions bind by affection, whereas law binds by coercion; and (3) religions are genuine communities, whereas law is not and cannot form communities in itself.[68] Such bifurcations between law

[66] A variety of ways of characterising the relationship exhibit the shades of meanings and confusions as well as illuminations that abound in this area, see: Joel Harrison, *Post-Religious Liberty* (Cambridge University Press 2020) 181, "religion and the secular"; Benjamin Berger, "Liberal Constitutionalism and the Unsettling of the Secular" in Rex Adhar (ed), *Research Handbook on Law and Religion* (Edward Elgar 2018) 198–220; see also Ran Hirschl, *Constitutional Theocracy* (Harvard University Press 2010) 79, 239, where "constitutionalism" and "religion" are imagined as opposites; see also Lorenzo Zucca, "Law v. Religion" in Lorenzo Zucca and Camil Ungereanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012) 137–159, 138, which bifurcates "law" and "religion" in similar fashion.

[67] Iain T Benson, "The Necessity for a Contextual Analysis for Equality and Nondiscrimination" in Jane F Adolph, Robert L Fastiggi, and Michael A Vacca (eds), *Equality and Non-discrimination: Catholic Roots, Current Challenges* (Pickwick 2019) 63–75. For a discussion of the terms "secular" and "faith" see Iain T Benson, "The Goal of Excluding Religion from the Idea of Public Benefit: Some Aspects of Neo-Secularist Strategies" in Barry W Bussey (ed), *The Status of Religion and The Public Benefit in Charity Law* (Anthem, 2020) 225–240, 231–233, and relation to the work of Berger and others: Iain T Benson, "The Case for Religious Inclusivism and the Judicial Recognition of Religious Associational Rights: A Response to Lenta" (2008) 1 Constitutional Court Review 297–312.

[68] *International Covenant of Civil and Political Rights* (ICCPR) UN General Assembly resolution 2200A (XXI) 16 December 1966 entry into force 23 March 1976 reads: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt

and religion—on occasion by scholars who hold a favorable disposition to the role of religion in culture—are, in fact, consistent with the exclusionary ideology of secularism, a term first coined by George Jacob Holyoake in 1851 for an ideology that falsely claimed neutrality.[69]

A good example of the error of homogeneity and failure to deal seriously with diversity is the Supreme Court of Canada's decision in *Trinity Western University* (2018 SCC)[70] denying an Evangelical Protestant university the accreditation of a law school because its "community covenant" spoke to a traditionalist conception of marriage and sexual relations. The British Columbia Court of Appeal judgment, which would have allowed accreditation of the law school, focused on the necessity allowing differences of belief within a democracy.[71] The unanimous decision of five judges of the British Columbia Court of Appeal was overturned by a majority of judges of the Supreme Court of Canada. John Gray's description of illiberal convergence and William Galston's description of "civic totalism" apply well to the Supreme Court of Canada's majority decision.

Secularism, properly understood, and contrary to the claims that it can exist in "open" or "pluralistic" or "public" forms, when understood historically offers no positive resources for constitutionalism. An open public sphere does not start off with the anti-religious squint evidenced by secularism. The "institutional" or "group" dimensions of religious freedom have

a religion or belief of his choice, and freedom, *either individually or in community* with others *and in public or private*, to manifest his religion or belief in worship, observance, practice and teaching" (emphasis added).

[69] Holyoake's secularist strategy is discussed in Owen Chadwick, *The Secularization of the European Mind in the Nineteenth Century* (Cambridge UP 1975) 88ff and Iain T Benson, "Considering Secularism" in Douglas Farrow (ed), *Recognizing Religion in a Secular Society* (McGill-Queens UP 2004) 83–98. Against this background the neologisms "open secularism" or "pluralistic secularism" are non sequiturs that amount to the equivalent of "healthy botulism." The neologism of "open-secularism" is taken out of its historical context and suggested as a possible reality in Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press 2011) 58–60; with respect, it simply adds confusion to what is being discussed.

[70] The two judgments are *Law Society of British Columbia v Trinity Western University and Brayden Volkenant* (2018) 2 SCR 293 and *Trinity Western University and Brayden Volkenant v. Law Society of Upper Canada* (2018) 2 SCR 453. See, for criticisms of the decision, Greg Walsh, "Trinity Western University and the Future of Conservative Religious Education" in Barry W Bussey and Angus JL Menuge (eds), *The Inherence of Human Dignity: Law and Religious Liberty* (Anthem 2021) vol 2, 185–202; Barry W Bussey, "Making Registered Charitable Status of Religious Organizations Subject to *Charter* Values" in Barry W Bussey (ed), *The Status of Religion and the Public Benefit of Charity Law* (Anthem Press 2020) 159–203; see also John von Heyking, "The Challenge and Promise of Religious Associations to Liberal Democratic Order" in Iain T Benson and Barry W Bussey (eds), *Religion, Liberty and the Jurisdictional Limits of Law* (LexisNexis 2017) 89–114, which discusses Tocqueville's critique of "the political logic of equality."

[71] *Trinity Western Law School and the Law Society of British Columbia* (BCCA 2016).

great importance to all of society and should not be subordinated to the driving paradigm of one viewpoint and group over others, as in the *Trinity Western University* decision where subsidiarity rights were accorded no weight in what was purported to be "balancing." Individualism and what sociologist Robert Nisbet refers to as "the centralization of authority" leads to the state's "penetration of traditional social authorities" in ways contrary to the maintenance of the social elements of the political order.[72] Recent criticisms suggest that the court has developed an unworkable standard and application with respect to proportionality, minimal impairment, and balancing of the interests in such cases.[73]

Systems and Life-worlds

Finally, it is useful to consider Jürgen Habermas's useful distinction between "life-worlds" and "systems."[74] The distinction is one that fits very well within the foregoing discussion of the importance of attention to associational life in relation to the role of law and the state in view of the goods attributed to functioning according to subsidiarity (as diversity) and not against it.

According to Habermas, "life-worlds" are the sets of shared meanings that constitute the many and varied voluntary associations to be found in free societies. "Systems," by contrast, are nonvoluntary and parasitic upon the life-worlds they colonize. Law and politics are "systems" in this schema, and most voluntary associations including religions are life-worlds.[75] Robert N. Bellah criticizes Habermas's schema as insufficiently aware of the role religions might play in "transforming the distortions of modernity that Habermas has so acutely analyzed."[76] Bellah notes Habermas's "incomplete

[72] Robert A Nisbet, *The Social Bond* (Alfred A Knopf 1970) 385. The primordial, group, and social goods of religion are well articulated in a South African Constitutional Court decision: see *Minister of Home Affairs and another v Fourie et al* 2006 (1) SA 524 (CC) at para 36 per Sachs J. Generally, on the nature of associational liberty and the problems of convergence, see Iain T Benson, *An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion* (PhD dissertation, University of the Witwatersrand 2013).

[73] Carmelle Dielemann, "Accommodating Rights in Administrative Law: A Critique of the Doré / Loyola Framework" (2021) 34 Cdn Jour of Admin Law & Practice 197–218.

[74] U. Steinhoff, *The Philosophy of Jürgen Habermas: A Critical Introduction* (Oxford UP, 2009) 210ff.

[75] Jürgen Habermas, *The Structural Transformation of the Public Sphere*, (tr) T. Burger and F. Lawrence (Harvard University Press, 1989). See Iain T Benson, "Pluralism, Lifeworlds, Civic Virtues and Civil Charters" in M Christian Green and Pieter Coertzen (eds), *Religious Pluralism in Africa—Prospects and Limitations* (SUN Press 2016) 287–306.

[76] See Robert N Bellah, "How to Understand the Church in an Individualistic Society" in Rodney L Petersen (ed), *Christianity and Civil Society* (Orbis Books 1995) 1–14, 5, and "Stories as Arrows: The

focus on autonomy" and failure to embrace "community" and points to subsidiarity as possessing a "rich set of implications" that revivify the life-worlds that Habermas seeks but cannot reach. For that task, Bellah urges the need for myth and tradition—in short, for religions.[77]

Conclusion: The Future of Subsidiarity in Constitutionalism?

The holistic application of the doctrine of subsidiarity requires a robust anthropology and incorporates local diversities while respecting the priority of associations. Philosophical reductions, including those reviewed previously, nullify the benefits of the doctrine. Whether or not a society may be deemed "open" or "closed" relates to the presence or absence of personal choice and decisions. A closed society restricts these freedoms. A focus on litigating rights disputes results in "winners and losers," reducing the scope for consensus and preventing modus vivendi.[78] What is also needed is a degree of consensus particularly in relation to living together with disagreement and difference, especially in multicultural and plural societies.

Lord Acton understood that the maintenance of liberty and freedom in legal regimes depends on respect for "multiple associations . . . [and] the limitation of the public authority."[79] For Acton, "the tendencies of centralization, of corruption, and of absolutism" can only be effectively opposed by "the influence of a divided patriotism"[80] and a recognition of the importance of multiple associations. Law and politics need to be understood as having their own important *but limited* jurisdictions.

Michael Polanyi has noted the importance of maintaining beliefs and traditions in relation to freedom and control:

Religious Response to Modernity" in Arvind Sharma (ed), *Religion in a Secular City: Essays in Honour of Harvey Cox* (Trinity Press International 2001) 91–104.

[77] Bellah, "Stories as Arrows," 101–103.

[78] Karl Popper, *The Open Society and its Enemies: Plato* (Princeton University Press 1971) 172–173. In relation to litigation and its limits, see Charles Taylor, *The Malaise of Modernity* (Anansi 2001) 116, 120.

[79] Baron Acton, *The History of Freedom and Other Essays* (Macmillan and Co, Ltd, 1907) 288–289.

[80] Ibid.

> If the citizens are dedicated to certain transcendent obligations and particularly to such general ideals as truth, justice, charity and these are embodied in the tradition of the community to which allegiance is maintained, a great many issues between citizens . . . can be left . . .—and are necessarily left—for the individual consciences to decide. The moment, however, a community ceases to be dedicated through its members to transcendent ideals, it can continue to exist undisrupted only by submission to a single centre of unlimited secular power.[81]

Polanyi implies that the most important and primary locations for the maintenance of "traditions" are associations, particularly religious associations.

T. S. Eliot recognized that a Christian society may use a structure like the parochial system that is in direct contact with the smallest units of the community and individual members and that the maintenance of a culture and society depended in part on the relationship between the part and the whole.[82]

The foregoing brings us to a fundamental question: how can politicians and those involved in law (legislators, judges, and lawyers) appreciate their own proper limits if law itself becomes not merely authoritative but, in a quasi-religious manner, *dogmatic*? How can they respect religions if in addition to losing a deep understanding of philosophy, religion, and tradition, the law itself has become *sectarian*, administering, in fact, "constitutional *theocracies*"? As Voegelin noted, this form of neo-gnosticism is itself an "ersatz *religion*" jealously defending its own formulations while deriding or subordinating with increasing disrespect the beliefs of others. He notes that "re-divinization [of modern political mass movements] has its origins in Christianity itself, deriving from components that were suppressed as heretical by the universal church"[83] For him, "Gnostic movements were not satisfied with filling the vacuum of civil theology; they tended to abolish Christianity."[84] For Voegelin, Gnosticism is nothing less than a civil religion, and in a memorable formulation he terms this movement an "immanentization of the eschaton"

[81] Michael Polanyi, *Science, Faith and Society* (University of Chicago Press 1946, 2nd imp 1966) 78–79; TS Eliot, *The Idea of a Christian Society* (Faber & Faber 1939) 47 and *Notes Towards the Definition of Culture* (Faber & Faber 1948). In the latter, Eliot notes: "the culture of Europe could not survive the complete disappearance of the Christian Faith . . . if Christianity goes, the whole of our culture goes" (122).

[82] Eliot, *The Idea of a Christian Society*, 47.

[83] Eric Voegelin, *The New Science of Politics: An Introduction* (Chicago Univ Press 1952) 107, 179.

[84] Ibid, 163.

that amounts to an "ersatz religion."[85] Canadian philosopher George Grant discussed a situation in which technique is victorious as in a "new relation to tradition" that is "hostile to the moral teachings of the past"—a condition in fact that amounts to a "theology of technique," which he says goes by the name of "liberalism," and by which he meant "the belief that man's essence is his freedom."[86]

Contemporary Italian philosopher Giorgio Agamben holds that nothing that becomes hypertrophic is properly healthy and that "with the eclipse of the messianic experience of the culmination of the law and of time comes an unprecedented hypertrophy of law—one that, under the guise of legislating everything, betrays its legitimacy through legalistic excess."[87]

Russian writer Nicholas Berdayev writes of the extreme *étatism* of Russian communism that takes the form of "the terrible hypertrophy of the state in Russian history."[88] Man's "power over nature" now threatened by "servitude to old cosmic and new technical forces" can only be accomplished, he believes, by "a rejuvenated Christianity" that is "true to its prophetic spirit" and "which turned towards the Kingdom of God."[89]

Writing about the same time as Berdayev, Spanish philosopher José Ortega y Gasset commented that the result of excessive state intervention on society would be fatal: "spontaneous social action will be broken up over and over again by State intervention; no new seed will be able to fructify. Society will have to live *for* the State, man *for* the governmental machine."[90] This warning is neither exaggerated nor untimely as evidenced by current developments.

Fears about undue state intervention in the life-worlds of associations have been given a new urgency due to the development of evermore efficient means of surveillance before and particularly under the state of exception relating to health concerns. In a recent article by a Chinese and two Italian authors, the new technologies of state surveillance used by the Chinese Communist regime are welcomed as a new normative model for the West. Far from decrying the movement away from the rule of law to the rule by technology, the article regards the advent of widespread global surveillance as inevitable and essential and announces the superiority of the Chinese approach *for global adoption*. The authors write: "we can predict that the

[85] Eric Voegelin, *Science, Politics and Gnosticism* (Henry Regnery and Company 1968) 83–114.
[86] George Grant, *Philosophy in the Mass Age* (Copp Clark 1959, 1966) iv.
[87] Gorgio Agamben, *The Church and the Kingdom* (Leland De La Durantaye tr, Seagull 2012) 40–41.
[88] Berdayev, *The Origin of Russian Communism*, 227.
[89] Ibid, 229.
[90] José Ortega y Gasset, *Revolt of the Masses* (Norton 1930, 1957) 121, emphasis in original.

Chinese advantage in emergency law and the development of a new global patten of law, *the rule of technology,* might point to the emergence of an unexpected Chinese legal leadership, determined by the final collapse of liberal constitutionalism provoked by Covid 19 [and the rise of populism]."[91]

Against this future vision of the rule of law captive to and assisted by a technological domination of life-worlds, which many would see as dystopic and despotic, what alternatives exist? Some have called for a different sort of revolution—one consistent with the long tradition adumbrated in this chapter but that centrally involves the turning of mind and heart based on the traditional teachings of Christianity.[92]

Paradoxically, at the very time that de-centralization and localization are starting to be viewed as essential to so many diverse areas, various theories evidence a loss of conviction in the principles of universality and integrated diversity necessary to maintain a holistic approach that respects the traditions that protect diversity within the whole. There is a deep paradox here and it is appropriate to ask: how can a *theocratic* constitutionalism achieve justice and the common good without incorporating the ordering principles uniquely marshaled within subsidiarity and traditions that developed and alone can nurture it?

The practice of subsidiarity is best lived and maintained within associations committed to the visions of an ordered cosmos that embrace and support it. Homogeneous approaches, including some of those described in this chapter, seem unlikely to sustain, much less perpetuate, the essential concepts of universal reason, human nature, the person, and the larger relations beyond the neighborhood and community that are the essence of lived and diverse subsidiarity and that are anathema to totalitarianisms.[93]

The commons, properly understood, is that realm of existence in which different moral traditions and languages of meaning, not always understood or accepted by those outside the group, can coexist rather than be unnecessarily interfered with by laws and "systems" that tend toward coercion. We are at the end of a history that believed liberalism was sufficient even if aspects

[91] See Ugo Mattei, Liu Guanghua, and Emanuele Ariano, "The Chinese Advantage in Emergency Law" (2021) 21(1) Global Jurist 1–58, 58.

[92] Philip Allot, "International Society and the Idea of Justice" in Mary Ann Glendon, Juan José Llach, Marcelo Sánchez Sorondo (eds), *Charity and Justice in the Relations amongst Peoples and Nations*, Acta 13, Proceedings of the Pontifical Academy of Social Sciences (Pontificia Academia Scientarium Socialium 2007) 41–48, 48. On the necessity of a "new constitutional organization of the human family" that involves a bottom-up conception of globalization that serves both pluralism and participation, see Kenneth R Himes, *Christianity and the Political Order* (Orbis Books 2013) 211ff.

[93] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973, new edn) 438.

of it are still deemed necessary. Homogeneity is not the home of freedom. It has been well said that liberal social ontologies "impose a secularising model of the relationship between the individual, the group and the state that is not neutral among religions and cultures."[94] Such models, whether of "liberal" or postliberal *illiberal* varieties, are not and by their own presuppositions *cannot* be respectful of differing but differentially legitimate alternative accounts of meaning. Subsidiarity acts as a check and balance against overweening homogeneity in all its forms and its embrace and development by constitutionalism is exigent.

[94] See Nicholas Aroney, "Freedom of Religion as an Associational Right" (2014) 33(1) University of Queensland Law Journal 153–186 and Nicholas Aroney and Patrick Parkinson, "Associational Freedom, Anti-Discrimination and the New Multiculturalism" (2019) 44 Australian Journal of Legal Philosophy 1, 27.