

BOOK REVIEW: MICHELLE EVANS AND AUGUSTO ZIMMERMANN (EDS) – GLOBAL PERSPECTIVES ON SUBSIDIARITY

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In the first volume of his celebrated work, *Democracy in America*, Alexis de Tocqueville wrote in 1835 that

[c]entralization...perpetuates a drowsy regularity in the conduct of affairs which the heads of the administration are wont to call good order and public tranquillity...but...[i]ts force deserts it when society is to be profoundly moved, or accelerated in its course; and if ...the cooperation of private citizens is necessary to the furtherance of its measures, the secret of its impotence is disclosed.¹

Though De Tocqueville's celebration of America's early 19th century success with decentralized power² would doubtless draw groans of nostalgia from many contemporary Americans, a number of his related insights are timeless.

For example, he noted that centralized power 'accustom[ed] men to set their own will habitually and completely aside',³ and the removal of any

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¹ Alexis de Tocqueville, *Democracy in America* (David Campbell Publishers, 1994) vol 1, 90.

² Ibid 92, 94. De Tocqueville tributes America's success with decentralization to the supremacy of each state legislature: *ibid* 87.

³ Ibid 86.

sense of individual responsibility for the welfare of the village enabled the individual to ‘fold his arms and wait till the whole nation comes to his aid.’⁴ He also said that when a nation has reached the point where individuals

oscillate...between servitude and licence,⁵ [fear of central bureaucrats and expectation of benefit from their largesse] that nation must either change its customs and its laws, or perish; for the source of public virtues is dried up; and though it may contain subjects, it has not citizens.⁶

For De Tocqueville, ‘patriotism and religion are the only two motives’⁷ which enable unity and these cannot be maintained in the long term by fear.⁸ No government can motivate or harness individual initiative in a manner approaching the efficiency of free enterprise.⁹

Michelle Evans and Augusto Zimmermann have done Australia and the world a service by taking the time to compile and edit the essays that make up their recent book entitled *Global Perspectives on Subsidiarity*.¹⁰ For neither De Tocqueville’s 19th century insights, nor at least three subsequent Papal encyclicals have changed the way we do business and government as they should have done.

⁴ Ibid 92.

⁵ Ibid 93.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid 94. Note that the Mormon Prophet Joseph Smith appears to have espoused subsidiarity principles in De Tocqueville’s time though without the modern Catholic label. An 1851 report records that before he died in Nauvoo, Illinois in June 1844, he was asked ‘how it was that he was enabled to govern so many people, and to preserve such perfect order.’ He is said to have responded, ‘I teach them correct principles, and they govern themselves’: (‘The Organization of the Church’, *Millennial Star*, 15 November 1851, 339).

¹⁰ Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014).

The contributions are diverse ranging from where the idea of subsidiarity came from, to how the concept plays out, or should play out in modern Brazil, Australia, Germany, the European Union and the global village.

But what is subsidiarity? Its latin root *subsidio*, literally means ‘to help’ or ‘aid’, but it is Catholic social teaching since 1891 that has provided the word ‘subsidiarity’ with its contemporary meaning. Nicholas Aroney explains early in the book that Popes in 1891, 1931 and 1991 have drawn threads of meaning together from distant roots in Aristotle and Aquinas.¹¹ In 1891, in his encyclical *Rerum Novarum*, Pope Leo XIII implied that while the state was obliged to act against the secret combinations of men established for evil purposes, the state had a greater obligation to encourage private associations focused on free enterprise and the common good.¹² Pope Pius XI fleshed out these ideas in his 1931 encyclical *Quadragesimo Anno* which was subtitled ‘On the Restoration of the Social Order and Perfecting it Conformably to the Precepts of the Gospel.’¹³ This second encyclical treating subsidiarity subject matter, included this statement:

[I]t is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice... and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought... to furnish help to the members of the body social, and never destroy and absorb them.

The supreme authority of the State ought... to let subordinate groups handle matters of lesser importance, which would otherwise

¹¹ Ibid 12.

¹² Ibid.

¹³ Ibid 32.

dissipate its efforts... the State will... do all things that belong to it alone... directing, watching, urging restraining.... [T]hose in power should be sure that the more perfectly graduated order is kept among the various associations, in observance of the principle of “subsidiarity function” [to enable]... the happier and more prosperous condition of the State.¹⁴

For Patrick K. Brennan,¹⁵ the Catholic position is that higher organizations, including the state, should never absorb those hierarchically below them, and when higher organizations assist those below them, they should only do so in a manner designed to strengthen in the long term so that they remain contributors to the flourishing of the society as a whole.¹⁶

But the Evans/Zimmermann project is not about Catholic evangelism. Rather, their primary goal is to identify the virtues in the principle of subsidiarity and expose more of its salutary applications.

Weinberger¹⁷ and Chaplin¹⁸ compare subsidiarity to related social and political concepts – respectively ‘sphere sovereignty’ from the Dutch Calvinist tradition and ‘social pluralism’, which is a political theory that aspires to divide authority in the interests of the greater good.

Weinberger suggests that ‘sphere sovereignty’ may be seen as the 19th century Dutch equivalent of Madison’s ‘separation of powers’ doctrine in the United States.¹⁹ If the doctrine is observed, it protects church and state from corrupting each other²⁰ but sphere sovereignty is complementary to

¹⁴ Ibid 35 quoting *Quadragesimo Anno*, 79 and 80.

¹⁵ Ibid ch 3.

¹⁶ Ibid 35.

¹⁷ Ibid ch 4.

¹⁸ Ibid ch 5.

¹⁹ Ibid 54.

²⁰ Ibid 59-61.

subsidiarity since it holds that social needs are best met at the lowest level.²¹

Chaplin says similarly that social pluralism and subsidiarity are complimentary because they enable the different communities within society that are necessary to human flourishing.²² Both promote a sense of community and counter the evil of individualism.²³

Reverend Sirico²⁴ develops De Tocqueville's insights about the evils of the dole and applies them to 21st century societies.²⁵ The state is better placed to provide defence than income security. The welfare state has 'drain[ed] private capital that could have gone towards helping others invest in future prosperity.'²⁶ Much better to let private local charity assess income support needs.²⁷ Private charity will not do anything for paupers that they can do for themselves because it understands that a dole ultimately diminishes human self-worth.²⁸

Zimmermann's own contribution to the collection²⁹ includes the suggestion that modern Brazil would benefit if it could implement subsidiarity into its constitutional and civic structures. Brazil-style statism supported by anti-change inertia and "compassionate individuals" who think the state is the only entity with the power to eradicate poverty and promote "social justice",³⁰ have resulted in a society that is completely

21

Ibid.

22

Ibid 64 (abstract).

23

Ibid 68.

24

Ibid ch 7.

25

Ibid 123-4.

26

Ibid 119.

27

Ibid 120.

28

Ibid 122.

29

Ibid ch 6.

30

Ibid 95.

“colonized” by the bureaucratization of all social relations.³¹ If Brazil could draw upon the principle of subsidiarity to decentralize,³² the redistribution of power would democratize society³³ and introduce a culture of individual responsibility in citizens.³⁴

Jurgen Brohmer discusses subsidiarity in his native Germany.³⁵ Though subsidiarity is embedded in the Basic Law (Constitution)³⁶ and though decentralization is the buzz throughout Europe at present,³⁷ there is still a strong bias towards central administration and recalibration of power to the Lander (states) has not been convincing.³⁸ In practice subsidiarity in modern German jurisprudence means little more than that no one can apply for European Union remedies until they have exhausted all the remedies available in local and national law.³⁹ For Brohmer that is still a pretty thin version of subsidiarity. But ongoing efforts to empower local municipalities with financial independence are a beacon of decentralization hope⁴⁰ – though that beacon remains on the horizon.

Professors Moens and Trone⁴¹ summarize that under the founding treaties of the European Union, subsidiarity is legally enforceable but ineffective.⁴² In practice, subsidiarity has only ever worked as a principle that has afforded political guidance. Even though some European Union countries feature constitutional provisions that allow direct legal action

³¹ Ibid 99.

³² Ibid 101.

³³ Ibid.

³⁴ Ibid 103-4.

³⁵ Ibid ch 8.

³⁶ Ibid 132: citing various constitutional provisions and noting that ‘all power lies with the states rather than the federal level’.

³⁷ Ibid 130.

³⁸ Ibid 129, 134, 137.

³⁹ Ibid 140-1.

⁴⁰ Ibid 146-7.

⁴¹ Ibid ch 9.

⁴² Ibid 157.

for breach of the subsidiarity principle,⁴³ commentators have concluded ‘that subsidiarity “was largely inoperable at the stage of adjudication”...[and is regarded] “essentially as a political and subjective principle”’.⁴⁴ They conclude that though there is hope that this essentially ‘moribund principle’⁴⁵ may be judicially resuscitated; it seems destined to be a would-be constitutional guard dog that does not bark!⁴⁶

Because Michelle Evans⁴⁷ addresses the relevance of the subsidiarity principle to Australian constitutional interpretation, some readers may find hers the most interesting contribution. Her discussion is captivating because she challenges contemporary orthodoxy. Though subsidiarity should be a natural fit in federal systems since power is already divided,⁴⁸ it does not work that way in Australia.⁴⁹ Subsidiarity themes dominated the pre-federation debates⁵⁰ and are unavoidable in any objective reading of the resulting Constitution,⁵¹ but Australia is no longer an authentic federation.⁵² The Senate has not protected state interests as the framers anticipated⁵³ and the High Court has disregarded its role as guardian of both state and federal constitutions.⁵⁴ It simply defers to the Commonwealth government.⁵⁵ Though Evans makes constructive

⁴³ Ibid 161-2: discussing France, Austria and Ireland.

⁴⁴ Ibid 163, citing Professor Dashwood’s report to the English House of Commons in 2008 and The Council of the European Union’s own annual subsidiarity report in 2011.

⁴⁵ Ibid 169.

⁴⁶ Ibid 169-70, referring to Justice Kirby’s memorable summary of the principle in *Kable v DPP (NSW)* (1996) 189 CLR 51 expressed in *Baker v R* (2004) 223 CLR 513, [54].

⁴⁷ Ibid ch 10.

⁴⁸ Ibid 185.

⁴⁹ Ibid 185-6, 188-98.

⁵⁰ Ibid 188-90.

⁵¹ Ibid 190-4.

⁵² Ibid 185, 189, 195, 203.

⁵³ Ibid 193-4, 203.

⁵⁴ Ibid 194 citing Quick and Garran, and Craven.

⁵⁵ Ibid 195-8.

suggestions as to how authentic federalism could be restored in Australia using subsidiarity principles,⁵⁶ one senses that the prospects of a correction in line with the original subsidiarity infused vision, are dim indeed. That is because neither one of the major political parties is ever likely to adopt a policy which would dilute their own power at the federal level.

Andreas Follesdal⁵⁷ stands back further than any of the other contributors and considers how subsidiarity principles could enhance global governance in the future. He asks whether subsidiarity principles might be the answer to those who protest against globalization since technology is turning the world into a village?⁵⁸ But he notes that subsidiarity like love, is a many-splendoured thing;⁵⁹ its Althusian variation has been used to justify separate homelands under the apartheid regime in South Africa⁶⁰ and its non-coercion principle which is generally respected in international law, says that improvement will be slow since improvement relies on the building of consensus.⁶¹

The editors acknowledge that their collection has only scratched the surface of subsidiarity's potential as a decentralizing and empowerment principle.⁶² The collection has focused on the principle's philosophical underpinnings and its expression in the field of political governance.⁶³ But subsidiarity's potential reach is much greater. The editors note that

⁵⁶ Ibid 200-3.

⁵⁷ Ibid ch 11.

⁵⁸ Ibid 207-8.

⁵⁹ Ibid 209-13 where he canvasses various theories of subsidiarity.

⁶⁰ Ibid 215-6.

⁶¹ Ibid 216: where Follesdal notes that state sovereignty practically dictates 'that international governance institutions must be based on the "consent of all nations"'.
⁶² Ibid 221.

⁶³ Ibid 2.

universities and corporations would benefit by exploring new ways to manage their human resources and employment relationships in its light.⁶⁴ That suggestion resonates with De Tocqueville's suggestion in 1835 that decentralization is the key to mobilizing individual enterprise and personal accountability.⁶⁵

⁶⁴ Ibid 220.

⁶⁵ De Tocqueville, above n 1, 90-4.