

Human Rights as Natural Juridical Goods and the Juridical Domain of the Principles of Catholic Social Doctrine

PETAR POPOVIĆ
Pontifical University of the Holy Cross
Rome, Italy

Introduction

IN RECENT YEARS, research has flourished concerning the historical occurrences and particular contextual settings of the term “human rights” in the magisterial documents of the Catholic Church—along with its other, usually interchangeably used,¹ equivalents such as “natural rights,” “basic rights,” or “fundamental rights.”² It is no exaggeration to say that

¹ Russell Hittinger advocates the thesis that the magisterial usage of the terms “human rights,” “natural rights,” or “fundamental rights” may be understood as interchangeable; see: “The Problem of the State in *Centesimus Annus*,” *Fordham International Law Journal* 15 (1991–1992): 980; “*Quinquagesimo Ante*: Reflections on *Pacem in Terris* Fifty Years Later,” in *The Global Quest for Tranquillitas Ordinis: Pacem In Terris, Fifty Years Later*, ed. Mary Ann Glendon, Russell Hittinger, and Marcelo Sánchez Sorondo (Vatican City: Pontificia Academia Scientiarum Socialium, 2013), 44.

² For a seminal study of this subject, see Mary Elsbernd, “Papal Statements on Rights: A Historical Contextual Study of Encyclical Teaching from Pius VI—Pius XI (1791–1939)” (PhD diss., Catholic University of Louvain 1985). See also Elsa Déléage, *Les droits de la personne selon l'Église catholique de 1891 à 2013* (Paris: Institut Universitaire Varenne, 2013). For briefer historical overviews of the concept of human rights in the Catholic social doctrine, see: Thomas D. Williams, *Who Is My Neighbor? Personalism and the Foundation of Human Rights*

magisterial documents' consistent use of the term "human rights" or its equivalents is practically coextensive with the development of official teaching on various issues of Catholic social doctrine. In fact, the *Compendium of the Social Doctrine of the Church* dedicates an entire section of its chapter 3 ("The Human Person and Human Rights") to the concept of "human rights,"³ thereby indicating that this concept is an integral part of the Catholic social doctrine (CSD).

However, the exact meaning of the concept of "human rights" is significantly less obvious than the historical consistency of its usage in CSD. Granted, the magisterial documents that mention "human rights" contain certain elements that, taken together, present at least a partial understanding of what is understood by this concept. Nonetheless, some authors regard these elements as insufficient for a clear doctrinal understanding of the concept, as well as for its precise connection with other essential principles of CSD.

Roland Minnerath argues that the magisterial "rights" talk risks implying a subjectivist shift toward a consideration of the person as the focus of rights while disregarding the objectivist perspective of that which is, according to nature, due in justice to the person.⁴ In Russell Hittinger's opinion, the magisterial usage of rights language, especially when not accompanied by a reference to the metaphysical scheme of duties arising from the natural law, is vulnerable to confusion with the "thin accounts of the human good that are so typical of contemporary liberal thought,"⁵ where rights are envisioned as mere conceptual extensions of a "negative anthropology."⁶ Jean-Yves Calvez and Jacques Perrin, in their defense of

(Washington, DC: Catholic University of America Press, 2005), 31–47; J. Brian Benestad, *Church, State, and Society: An Introduction to Catholic Social Doctrine* (Washington, DC: Catholic University of America Press, 2011), 51–73; Roland Minnerath, "La doctrine sociale de l'Eglise et les droits subjectifs de la personne," in *Catholic Social Doctrine and Human Rights*, ed. Roland Minnerath, Ombretta Fumagalli Carulli, and Vittorio Possenti (Vatican City: Pontificia Academia Scientiarum Socialium, 2010), 49–59; Pontifical Commission for Justice and Peace, *The Church and Human Rights* (1975); Javier Ruiz Bursón, "El lenguaje de los Derechos Humanos en el magisterio pontificio," *Persona y Derecho* 80 (2019): 207–251.

³ Pontifical Commission for Justice and Peace, *The Compendium of the Social Doctrine of the Church* (2004), §§152–59.

⁴ Minnerath, "La doctrine sociale," 52–53.

⁵ See Hittinger, "Problem of the State in *Centesimus Annus*," 994.

⁶ To consider rights as the extensions of a "negative anthropology" amounts to affirming that these rights are founded upon the architectonic anthropological premise of the "radical indeterminacy of human nature," where philosophical

the magisterial teaching on human rights, construe a rather provocative, “straw-man” critique: from the premise that “man has rights, in himself, before even we consider his relationships with other free persons or with society,” it follows that human rights in CSD might contain a foundational reference to individualism; now, “is not this simply a new edition of the . . . belief . . . of those who proclaimed rights of man in 1789?”⁷ In a trenchant critique of the concept of human rights in general, the French legal historian Michel Villey asserts that “the appearance of human rights bears witness to the decomposing process of the concept of right.”⁸ In his opinion, the theoretical attempt to “measure a [juridical] relationship which includes plural terms by taking as the starting point only one of these terms, namely man (or his desires, his will or the individual’s subjective understanding),”⁹ inevitably leads to a concept of right that promotes radical individualism.¹⁰

These and similar perplexities may be summed up in the following question: “Cannot the word ‘rights’ be used without endorsing a whole series of propositions that would be judged incompatible with the Christian tradition?”¹¹

Most of the authors who express such perplexities are prepared to defend the thesis of the compatibility between the concept of human rights and CSD. The crucial question is: under what conditions? What are the *exact elements* that a doctrinal position on the concept of human rights

claims of “what man is *not*” are “combined with a deep seated reluctance to affirm [positive] normative anthropological content” (Russell Hittinger, “Human Nature and States of Nature in John Paul II’s Theological Anthropology,” in *Human Nature in its Wholeness: A Roman Catholic Perspective*, ed. Daniel Robinson, Gladys M. Sweeney, and Richard Gill [Washington, DC: Catholic University of America Press, 2006], 10, 18–20).

⁷ See Jean-Yves Calvez and Jacques Perrin, *The Church and Social Justice: The Social Teaching of the Popes from Leo XIII to Pius XII (1878–1958)*, trans. J. R. Kirwan (Chicago: Henry Regnery, 1961), 109–10.

⁸ Michel Villey, *Le droit et les droits de l’homme* (Paris: Presses Universitaires de France, 1983), 154. The translation of this text, as well as other translations in this article from original texts in French, Spanish, German, or Italian into English, are our own. Therefore, the responsibility for their correct translation to English, as well as for eventual shortcomings regarding these translations, is completely ours.

⁹ Michel Villey, “Le droit dans les choses,” in *Controverses autour de l’ontologie du droit*, ed. Paul Amselek and Christophe Grzegorzcyk (Paris: Presses Universitaires de France, 1989), 24.

¹⁰ Michel Villey, *Philosophie du droit*, vol. 1, *Définitions et fins du droit* (Paris: Dalloz, 1978), 166–67.

¹¹ Williams, *Who Is My Neighbor?* 72.

should possess in order to faithfully reflect other essential claims of CSD?

Certainly, the Catholic Church considers the coherence between the concept of human rights and CSD to be one of the pillars of its social teaching.¹² The social magisterium seems to employ the concept of human rights as if there is no room for potential perplexities regarding its usage.

In the first part of this article we shall argue that the academic understanding of CSD's underlying conception of human or natural rights is in need of a more adequate and more explicit synthesis. Moreover, we are convinced that this synthesis must also be *juridical*. That is, it must be adequately founded upon not only a correct philosophical anthropology but also the proper *juridical* anthropology, rooted in both the tradition of CSD and in an adequate understanding of the concept of "right" (*ius*).¹³ Without a clear understanding of the concept of human or natural rights precisely as juridical rights, this part of CSD risks participating in a "considerable disagreement" and "much ambiguity" which exists in the secular realm regarding the "philosophical justification, juridical interpretation, or political possibilities" of human rights.¹⁴ On the contrary, "human rights must be clearly defined and given *juridical* explanation."¹⁵

A possible doctrinal confusion may arise not only *ad extra* between CSD's position and secular conceptions of human rights, but also *ad intra* of the CSD itself. The lack of precision in understanding the concept of human or natural rights causes the interrelation between these rights and the principles of the social doctrine to remain on an unduly vague level of analysis.¹⁶ How *exactly* are the human rights linked to the principle of the

¹² "The movement toward the identification and proclamation of human rights is one of the most significant attempts to respond effectively to the inescapable demands of human dignity" (*Compendium of the Social Doctrine of the Church*, §152); "It belongs to the Church always and everywhere to announce moral principles, even about the social order, and to render judgement concerning any human affair insofar as the fundamental rights of the human person or the salvation of souls requires it" (1983 *Code of Canon Law*, can. 747, no. 2).

¹³ We shall henceforth refer to the concept of "right" (in the singular) for the phenomenon denoted by the Latin term *ius*. As we shall see, the original meaning of this concept is different from the ordinary meaning of "rights" (in the plural), "human" or "natural." Thus, whenever we mention rights (in the plural) we actually presuppose the doctrinal content of what we shall present as the objectivist-conceptual meaning of right (in the singular).

¹⁴ International Theological Commission [ITC], *The Dignity and Rights of the Human Person* (1983), §3.2.2.

¹⁵ ITC, *Dignity and Rights of the Human Person*, §3.2.2 (emphasis added).

¹⁶ "In fact, the roots of human rights are to be found in the dignity that belongs to each human being" (*Compendium of the Social Doctrine of the Church*, §153); "The

dignity of the human person or to the principle of the common good? Is there any connection between human or natural rights and the principles of subsidiarity and solidarity? And, if there is, what does it amount to? Can the CSD “arrive at a correct understanding of the basic concepts . . . such as . . . right [and] justice”¹⁷ without proposing to settle more technical questions, and without establishing (or identifying itself with) a particular school of juridical philosophy to the exclusion of all others?¹⁸

In the second part of this article we shall present our understanding of the link between the concept of human or natural rights and the juridical domain inherent in the four principles of CSD. The last part of the article will be dedicated to tracing out possible juridical implications of Pope Francis’s new guidelines “derived from the pillars of the Church’s social doctrine.”¹⁹

The Objectivist-Contextual Approach to Human Rights: The Natural Law

In order to safeguard CSD’s conception of human rights from any subjectivist²⁰ interpretations, it is usually affirmed that human rights should be unambiguously posited within an “objectivist” metaphysical context. This usually includes the imperative to explicitly invoke or to implicitly

demands of the common good . . . are strictly connected to respect for and the integral promotion of the person and his fundamental rights” (*Compendium of the Social Doctrine of the Church*, §166).

¹⁷ *Compendium of the Social Doctrine of the Church*, §77.

¹⁸ See *Compendium of the Social Doctrine of the Church*, §§68, 85.

¹⁹ Pope Francis, Apostolic Exhortation *Evangelii Gaudium* (2013), §221. As the note 181 attached to this text explains, “the pillars of the Church’s social doctrine” are, in fact, the general, fundamental, universal, and permanent “principles” of CSD. This note directs the reader to §161 of *Compendium of the Social Doctrine of the Church*, which presents the “Principles of the Church’s Social Doctrine.”

²⁰ By the term “subjectivist interpretation” we understand a conception of human rights that is based on an individualist account of human nature, where natural rights of the person may be inferred in abstraction from the social, relational aspect of his nature (a view criticized by Villey, as we have seen). In addition, this “subjectivist interpretation,” wherein man is envisioned as “essentially alone,” is merged with the so-called “negative” juridical anthropology—itself a combination of the claim for a “radical indeterminacy of human nature” and what Martin Rhonheimer critically refers to as the “strong concept of autonomy.” See: Hittinger, “Human Nature and States of Nature,” 10, 18–20; Martin Rhonheimer, “The Liberal Image of Man and the Concept of Autonomy: Beyond the Debate between Liberals and Communitarians,” in *The Common Good of Constitutional Democracy: Essays in Political Philosophy and on Catholic Social Teaching* (Washington, DC: Catholic University of America Press, 2013), 38.

appeal to the natural law, as it is outlined in its Thomistic synthesis. This imperative, it is said, establishes an inextricable link between rights and the concept of duties. Pope John XXIII paradigmatically adopts this view when he writes, "The natural rights . . . are inextricably bound up with as many duties. . . . These rights and duties derive their origin, their sustenance, and their indestructibility from the natural law, which in conferring the one imposes the other."²¹ In fact, one of the principal contexts in which the Catholic Church invokes the natural law is precisely in response to "the need to provide a basis in reason for the rights of man."²²

It seems, however, that each time when the magisterium addresses the issue of human rights without immediate reference to natural law or to the duties derived therefrom, the concept of human right is considered to be left *eo ipso* vulnerable to the possibility of confusion with various reductionist visions of human rights. Thus, for example, Hittinger claims that while Pope Leo XIII's endorsement of the concept of natural right "represented a significant adjustment to the semantics, if not the substance, of modern rights theories," his conception of "right was contextualized in terms of both the eternal or natural law, as well as duties to the common good."²³ By contrast, when the appeal to natural law is not explicitly highlighted in a magisterial document, for example in Pope John Paul II's *Centesimus Annus*, the concept of human rights employed therein is immediately viewed with extreme caution.

Does the absence of explicit reference to natural law represent a rhetorical anomaly or oversight, or does it bespeak a substantive position? . . . Has the Pope taken the next step, which is to drop the metaphysical language of natural law . . . in favor of an all-purpose language of natural rights?²⁴

²¹ Pope John XXIII, Encyclical Letter *Pacem in Terris* (1963), §28. Hittinger observes: "Ever since the pontificate of Leo XIII, Rome has endeavored to integrate this human rights project with natural law. . . . *Pacem in Terris* (1963) was the high tide of that ambition" ("Natural Law and Public Discourse: The Legacies of Joseph Ratzinger," *Loyola Law Review* 60 [2014]: 271; see also *Compendium of the Social Doctrine of the Church*, §156).

²² ITC, *In Search of a Universal Ethic: A New Look at the Natural Law* (2009), §35.

²³ See Hittinger, "Problem of the State in *Centesimus Annus*," 954.

²⁴ See Hittinger, "Problem of the State in *Centesimus Annus*," 982. Hittinger adds further that Pope John Paul II "seems to ground these rights in a personalistic-theological view of the human person, but without any of the intermediate reasons tradition associated with natural law [in the Scholastic method that permitted greater clarity of expression]" (993). We have elsewhere advocated the thesis that John Paul II's philosophical method is compatible and intrinsically

In a similar vein, throughout her study on the occurrences and contexts of the concept of *ius* in papal statements, Mary Elsbernd filters the mentions of *ius* through their relation with the natural law as the source of duty. She thereby assigns the textual occurrences of the term *ius* to an objectivist (wherein the relation between *ius* and natural law as the source of duty is verified) or subjectivist meaning (wherein *ius* is used in the fashion of modern-era natural-rights schools).²⁵

In addition, the 1975 document entitled *The Church and Human Rights*, published by the Pontifical Council for Justice and Peace, describes the intrinsic link between the concept of right and corresponding duties as the “logical and real relationship which exists between the two aspects of the same right: *facultas* and *obligatio*, existence of right and its consequent responsibility.”²⁶ Remarkably similar to this argument is Ernest Fortin’s claim that the concept of right, understood essentially as a faculty (*facultas*), necessarily demands an additional element to adequately safeguard the essence of right against its potential subjectivist reductions. In his view, this additional element is precisely the rights’ structural “subordination to an antecedent law that circumscribes and relativizes them.”²⁷

linked to a Thomistic approach, and especially with regard to Aquinas’s natural-law theory; see Petar Popović, “Securing the Foundations: Karol Wojtyła’s Thomistic Personalism in Dialogue with the Natural Law Theory,” *Nova et Vetera* (English) 16 (2018): 233–59.

²⁵ See Elsbernd, “Papal Statements,” 134, 175, 330, 332, 397–99, 438–39, 610–14. According to Hittinger, an interesting parallel argument may be built around the contrast between the notion of objectivist *ius* founded on the concept of duty as a *munus* and the modern subjectivist conception of “rights” precisely as “immunities.” The term *munus* denotes a natural or supernatural office or mission consisting of specific tasks to be acted out, and is sometimes used by the magisterium in the place of the terms such as “duty” or “obligation.” On the other hand, *immunitas* actually implies, already on an etymological level, the very lack of *munus*. In Hittinger’s view, the principles of the social order cannot begin with immunities or with negative rights, but with the correct understanding of the concept of *munus* which, in CSD, “provides the teleological and social framework for the juridical conception of rights.” As he himself highlights, “the *iura* are located in the *munera*” (Hittinger, “Social Pluralism and Subsidiarity in Catholic Social Doctrine,” *Annales Theologici* 16 [2002]: 393, 398, 404). For the concept of *munus*, see also: Elsbernd, “Papal Statements,” 625–630, 653–655; Janet Smith, *Humanae Vitae: A Generation Later* (Washington, DC: Catholic University of America Press, 1991), 129, 136–48.

²⁶ *The Church and Human Rights*, §4.

²⁷ Ernest L. Fortin, “‘Sacred and Inviolable’: *Rerum Novarum* and Natural Rights,” *Theological Studies* 53 (1992): 221.

Since rights are already implied in the notion of duty—if I have a duty to do something, I must have the right to do it—there is no point in opposing them to each other. What they represent would be nothing other than the two sides of a single coin.²⁸

According to this objectivist-contextual view, then, if we leave out the explicit reference to the aspect of *obligatio*, the concept of right is essentially denoted by the term *facultas*. Now, is the term *facultas* really the best doctrinal option to conceptualize the essence of right? From what has been noted so far, this term is not considered as adequate, of itself, to provide sufficient warrant that the right, without the appeal to *obligatio*, will be understood as anything other than an empty, free-floating, or as Hittinger says, “all-purpose” concept. Hence, the right understood as *facultas*, stripped of the appeal to natural law, may potentially be conceived as a mere conceptual tool to be employed within any doctrinal context. The result is a highly weakened conception of the essence of right.²⁹

Is it possible to formulate a juridical argument that (1) inheres in the semantics of the concept of right alone and (2) parallels that of the foundation of right in natural law and the obligations derived thereof? We believe that an alternative viewpoint on the doctrinal-historical evolution of magisterial rights language would provide considerable help in answering this question. Francis Canavan is among those who advocated such a viewpoint: “[There is] a notion, advanced by some, that the recent popes have switched from traditional natural law to a modern natural-rights theory [but] it would be more accurate to say that . . . they have incorpo-

²⁸ Fortin, “Sacred and Inviolable,” 222.

²⁹ To be sure, there is no question whether human rights should be conceptualized as intrinsically linked to prior duties arising from the natural law, since they most certainly should be. In this sense, the above described version of the objectivist-contextual approach is both valid and adequate, as well as deeply rooted in the terminological and doctrinal tradition of rights talk in the CSD. Surely, no pontiff has ever formulated a statement regarding human or natural rights without at least implicitly envisioning them as deeply anchored in the objective metaphysical context of natural law and duties which arise from it. Even John Paul II, beyond the critiques of his doctrine of natural rights and its potentially subjectivist interpretation, frequently referenced “a correct understanding of the rights of the person” (see John Paul II, Encyclical letter *Centesimus Annus* [1991], §47) and, even more so, the “objective rights of man” (see John Paul II, Encyclical letter *Redemptor Hominis* [1979], §17). However, even if the natural-law discourse was at times “tuned down” in certain magisterial documents, the aspect of the *tradition* inherent in CSD should of itself supply the missing elements of the objective metaphysical context (See *Compendium of the Social Doctrine of the Church* §§80 and 85–87).

rated human rights into their doctrine of natural law.”³⁰ Another example is Zachary R. Calo’s claim that, instead of granting “an unqualified *imprimatur*,” the Catholic Church rather cultivates “a distinctive understanding of rights theory that incorporates aspects of liberalism while advancing a fundamental reconceptualization of its meaning and foundation.”³¹ It is precisely this “reconceptualization” of the very concept of human rights, and its implications, that we wish to expand upon in the following section.

The Objectivist-Conceptual Approach to Human Rights: The Concept of “Right”

We would like to call attention to a different approach in the Thomistic tradition of the objectivist line of argumentation regarding natural rights. It is not focused on the metaphysical-normative context of natural law, but rather on the semantics of the concept of “right” itself. We may call it the objectivist-*conceptual* (as distinct from *contextual*) approach.

It is by now a well-researched doctrinal issue that the premodern—and paradigmatically Thomistic—essence of the term “right” was not founded upon the term *facultas* or *potestas*, but instead on a conception of a certain “just order.”³² In this premodern “primary objective sense,” right was envisioned as the object of the virtue of justice, as “exterior to the agent, dependent on a certain objective equity between another and the activity of justice.”³³ The essence of *ius* is that of “the right *thing*,” “one’s due,” or “one’s proper share” in the relationship of justice.³⁴ This doctrine of the “objective” meaning of right is rooted in Thomas Aquinas’s *dictum* on the *ius* as—primarily and essentially—the “just thing itself” (*ipsa res iusta*), precisely as the object of the virtue of justice.³⁵ By contrast, the relocation of the essence of right from “the just thing itself” to the sphere of moral *powers* or *faculties* to advance claims regarding things or otherwise appeal to liberties and immunities—denoted by the term “subjective right”—is often said to represent a decadent modern,

³⁰ Francis S. Canavan, “The Image of Man in Catholic Thought,” in *Catholicism, Liberalism, and Communitarianism: The Catholic Intellectual Tradition and the Moral Foundations of Democracy*, ed. Kenneth L. Grasso, Gerard V. Bradley, and Robert P. Hunt (Lanham, MD.: Rowman & Littlefield, 1995), 19–20.

³¹ Zachary R. Calo, “Catholic Social Thought and Human Rights,” *American Journal of Economics and Sociology* 74 (2015): 94.

³² Williams, *Who Is My Neighbor?*, 23.

³³ See Elsbernd, “Papal Statements,” 12–13.

³⁴ Fortin, “Sacred and Inviolable,” 220.

³⁵ *ST II-II*, q. 57, a. 1.

decidedly “subjectivist” version of medieval *ius*.³⁶

Beyond the lack of scholarly consensus regarding his conclusions, it is undisputed that Michel Villey catalyzed the debate on the distinction between premodern objectivist and modern subjectivist conceptions of right that took place during the second half of the twentieth century. Villey argued that the tradition of the usage of the term *ius* had seen the conceptual shift—a crossing of what he calls the “watershed”—from the classical “objective” sense to the modern vision of right as essentially “subjective right.”³⁷ The premodern context was an expression of the medieval *reicentric* juridical culture, wherein juridicity was essentially predicated of “things” precisely as they are “caught” within relations of justice. Aquinas’s work, in Villey’s view, witnessed to the premodern mainstream juridical mentality in which nothing could have been further from the concept of *ius* than to predicate individual “power” or “faculty” of its essential meaning.³⁸ Although a simultaneous, diversified usage of the term *ius* between its *primary* objectivist meaning and the *accidental* subjectivist sense was already practical in medieval juridical experience, Villey claimed that Aquinas never placed *ius* in the conceptual realm of anything other than the just *thing* (*res iusta*).³⁹

This historical visit upstream from the “watershed” takes us back to the

³⁶ See Elsbernd, “Papal Statements,” 12–13.

³⁷ Michel Villey, *La formation de la pensée juridique moderne* (Paris: Presses Universitaires de France, 2013), 261.

³⁸ Michel Villey, “Droit Subjectif I (La genèse du droit subjectif chez Guillaume d’Occam),” in *Seize essais de philosophie du droit dont un sur la crise universitaire* (Paris: Dalloz, 1969), 152–53.

³⁹ Michel Villey, “Si la théorie générale du droit, pour Saint Thomas, est une théorie de la loi,” *Archives de philosophie du droit* 17 (1972): 428. Villey writes elsewhere: “The subjective sense of the word ‘*ius*’ still constitutes but an accidental feature, a reflection of the principal sense” (“Les origines de la notion de droit subjectif,” in *Leçons d’histoire de la philosophie du droit* [Paris: Dalloz, 2002]), 240). One of Villey’s most fervent critics, Brian Tierney, seems to agree with Villey in at least this argument, namely, that Aquinas’s doctrine of right cannot be said to have a predominant subjectivist meaning (Tierney, “Natural Law and Natural Rights: Old Problems and Recent Approaches,” *The Review of Politics* 64 (2002): 393). For more information on the doctrinal and historical debate between Villey and Tierney, see: Petar Popović, “The Concept of ‘Right’ and the Focal Point of Juridicity in Debate Between Villey, Tierney, Finnis and Hervada,” *Persona y Derecho* 78 (2018): 65–103; Thierry Sol, “La controverse Villey-Tierney sur la naissance du droit subjectif au XIIe siècle: difficultés et valeur heuristique d’un anachronisme conceptuel,” in *Penser l’ordre juridique médiéval et moderne: regards criosés sur les méthodes des jurists*, ed. Nicolas Laurent-Bonne and Xavier Prévost (Paris: Lextenso éditions, LGDJ, 2016), 209–34.

same doctrinal problem that we encountered earlier. When the theorists of Thomistic natural law downstream from the “watershed,” and right up to our present context, sought to secure an objective foundation for this new, paradigmatic subjectivist concept of right, they appealed exclusively to the legal order of natural law. A good example of this approach is John Finnis’s so-called “new natural law theory.” Finnis maintains that nothing really significant was lost by crossing the conceptual “watershed.” The subjective and objective conceptions of right are interchangeable, in his view. However, he prefers the modern conception of subjective rights, provided that the continual appeal to the order of natural law is structurally secured.⁴⁰

Thus, if we appeal *only* to the natural law and duties derived therefrom in order to provide the concept of human rights with the objective foundations, then we are probably operating with the concept of right which has the essential structure of subjective right: a faculty, a moral power, a liberty, or an immunity.⁴¹ It follows, then, that at least some of the

⁴⁰ John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2011), 205. Finnis writes further: “There should be no question in wanting to put the clock back. The modern idiom of rights is more supple and, by being more specific in its standpoint or perspective, is *capable* of being used with more differentiation and precision than the pre-modern use of ‘the right’ (*jus*)” (209). For the necessity of the subjective rights’ appeal to natural law, see Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), 135. For his claim that Aquinas had, in fact, adopted a doctrinal position and language of subjective rights, see Finnis, “Postscript,” in *Natural Law and Natural Rights*, 465. For more of Finnis’s claims that nothing of importance was lost by crossing the conceptual “watershed,” see: Finnis, “Natural Law,” in *Reason in Action: Collected Essays*, vol. 1 (Oxford: Oxford University Press, 2011), 207; Finnis, “Aquinas on Ius and Hart on Rights: A Response to Tierney,” *The Review of Politics* 64 (2002): 410.

⁴¹ Finnis compliments the American jurist Wesley Newcomb Hohfeld for “accommodating satisfactorily” the modern grammar of subjective rights into a comprehensive schema wherein “all assertions or ascriptions of rights can be reduced without remainder” to one or some combination of the following four categories: claim-right, liberty, power, immunity (*Natural Law and Natural Rights*, 199). Finnis advocates that “rights of each of the four Hohfeldian types are spoken of by Aquinas” (“A Grand Tour of Legal Theory,” in *Philosophy of Law: Collected Essays*, vol. 4 [Oxford: Oxford University Press, 2011], 115–16). In Finnis’s view, when Aquinas spoke about the “duties of justice” to other people (in *ST* II-II, q. 122, a. 6) he had actually implied their logical, structural flip sides: Hohfeldian subjective rights (*Aquinas*, 136; “Aquinas on Ius and Hart on Rights,” 409–10; “On Moyn’s *Christian Human Rights* (2015),” *King’s Law Journal* 28 [2017]: 14–15). For Hohfeld’s original insights, see: Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *Yale Law Journal* 23 (1913):

perplexities regarding CSD's rights talk derive from the possibility that the magisterium conceives human rights as essentially the Hohfeldian type of subjective rights. There are a number of reasons why such a conclusion would not prove to be valid.

First, regardless of the occasional subjectivist expressions in magisterial rights talk,⁴² John Lamont notes that "the inference from the Church's defending human rights to her defending subjective rights could only be warranted if Church teachings explicitly identified human rights with subjective rights—which they do not."⁴³ Lamont elsewhere affirms that "a grasp of [the] actual meaning [of the notion of human rights], and of its roots in Thomist thought, is essential if this teaching is to bear any good fruit."⁴⁴ True, CSD never affirmed, nor implied, that it understands human or natural rights as essentially Hohfeldian subjective rights.⁴⁵ Is it

28–59; Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 26 (1917): 710–70.

⁴² Besides the already mentioned reference to the essence of right as a *facultas* in the 1975 *Iustitia et Pax* document on human rights, Pope Leo XIII has also, in one textual *locus*, defined right (*ius*) as "a moral power"; see Encyclical Letter *Libertas* (1888), §23. For Pope Leo's more frequent, objectivist-conceptual references to *ius*, see Elsbernd, "Papal Statements," 278–86, 294–98. Leo's subjectivist *dictum* should also be read in connection with other expressions across the CSD timeline, like *iurisoffici* (a single word "right-duty"; see John Paul II, *Centesimus Annus* §§5, 29) or the "just rights" (*iustorum iurium*, see John Paul II, *Laborem Exercens* [1981], §20). For other incidental examples of subjectivist "rights" talk, see the reference to "subjective right" in Paul VI, Discourse to the Tribunal of the Sacred Roman Rota, January 29, 1970, §1. See also the mention of the "protection of subjective rights" in the Preface to the Latin edition of the 1983 Code of Canon Law.

⁴³ John R. T. Lamont, "Conscience, Freedom, Rights: Idols of the Enlightenment Religion," *The Thomist* 73 (2009): 233.

⁴⁴ John R. T. Lamont, "Historical Notions of Rights and Freedom," in *Relativism and Human Rights: Can They Coexist?*, ed. Philip Elias (Sydney: Warrane College, 2007), 14.

⁴⁵ The 2009 document *In Search of a Universal Ethic: A New Look at the Natural Law* by the International Theological Commission (ITC), on natural law, does in fact mention the term "subjective rights." The context of the appearance of this term, however, is very insightful. In the first place, the paragraph in which the term appears is rather revealing with regard to the fact that the document does not endorse Hohfeldian subjective rights: "The norms of natural justice [Italian *i diritti naturali*; French *les droits naturels*] . . . express what is naturally just, prior to any legal formulation. [They] are expressed in a particular way in the subjective rights of the human person. . . . These rights, to which contemporary thought attributes great importance, do not have their source in the fluctuating desires of individuals, but rather in the very structure of human beings and their humanizing

true, however, that CSD never acknowledged the adequacy of the Thomistic doctrine of right as the *ipsa res iusta* ("the just thing itself"), or that it has never otherwise distanced itself from a subjectivist interpretation of human rights?

According to Minnerath, the magisterium of the Catholic Church initially expressed reservations about the notion of human subjective rights, precisely because such a notion was formulated within a context of "an anthropology which is alien to the Church."⁴⁶ He adds that the Church did, in fact, later adopt the language of subjective rights, but not as a term which replaced antecedent conceptions of right.⁴⁷ In his view, CSD accommodated the language of subjective rights within the objectivist metaphysical context of natural law, but also within the "classical perspective on natural right."⁴⁸ Surely, John Paul II's above-mentioned appeal to the "objective rights of man" is not a terminological coincidence: human rights are clearly envisioned as "objective," in clear opposition to their potential interpretation as "subjective."

The concepts of human rights and law, as well as their moral foundations, are a recurrent theme of Pope Benedict XVI's writings both prior to and during his pontificate. It seems that Benedict understands the essence of right as an autonomous juridical concept dependent upon, but not reducible to, the objectivist metaphysical context of natural law. The right, he claims, "loses its foundational terrain" once the "moral level of analysis is not recognized as a *juridical* good that should be defended, because it is understood as something already pertaining to subjective judgement."⁴⁹

relationships. The rights of the human person emerge therefore from the order of justice that must reign in relations among human beings. To acknowledge these natural rights of man means to acknowledge the objective order of human relations based on the natural law" (§92). The last sentence of the quoted paragraph contains a clear reference to the objectivist metaphysical context provided by natural law, which is actually the main thematic focus of the whole document. Next, the ITC document clearly refutes a conception of subjective rights understood as mere juridical "vehicles" for the "fluctuating desires of individuals." Perhaps even more importantly, the document understands *ius naturale* as "that which is naturally just" (i.e., right in the objective, premodern sense), while the subjective rights are only the "particular expressions" of *ius naturale*.

⁴⁶ Minnerath, "La doctrine sociale," 49.

⁴⁷ Minnerath, "La doctrine sociale," 49.

⁴⁸ Minnerath, "La doctrine sociale," 54.

⁴⁹ Joseph Ratzinger, "Christliche Orientierung in der pluralistischen Demokratie?," in *Pro Fide et Iustitia: Festschrift für Agostino Kardinal Casaroli zum 70. Geburtstag*, ed. Herbert Schambeck (Berlin: Duncker & Humbolt, 1984), 752 (emphasis added). See also Joseph Ratzinger, "Crises of Law," in *The Essential Pope Bene-*

In one of Benedict's addresses to the Tribunal of the Roman Rota, the pontiff notes that the law already contains an inherent reference to the nucleus of the juridical domain denoted by the term "natural right."⁵⁰ He refers to this approach as "realistic."⁵¹ In another address to the Tribunal of the Roman Rota, Benedict highlights the distinction of the moral domain from the juridical domain, wherein the essence of right was clearly not envisioned in a subjectivist fashion (as a mere faculty or liberty), but as a good belonging to the order of justice: a *juridical* good.⁵²

Next, the final statement of the 2009 plenary session of The Pontifical Academy of Social Sciences, dedicated to the topic of "Catholic Social Doctrine and Human Rights," highlights the fact that CSD adopted "the realistic Aristotelic-Thomistic anthropology" in its proclamations on the anthropological bases of human rights.⁵³ This realistic Aristotelic-Thomistic juridical anthropology is founded on the argument for the objectivist-contextual view.⁵⁴ The Academy has added a parallel argument asserting that such anthropology is also linked to the very semantics of the concept of right.

dict XVI: His Central Writings and Speeches, ed. John F. Thornton and Susan B. Varenne (New York: HarperCollins, 2007), 378: "Because, in modern states, metaphysics and Natural Law are devalued, . . . the very concept of [right] is losing its precise definition."

⁵⁰ "The reality which is regulated [by the law] always contains a nucleus of natural right . . . with which every norm must be in harmony *in order to be* rational and *truly juridical*" (Pope Benedict XVI, Address for the Inauguration of the Judicial Year of the Tribunal of the Roman Rota, January 21, 2012; emphasis added).

⁵¹ Benedict XVI, Address for the Inauguration of the Judicial Year of the Tribunal of the Roman Rota 2012.

⁵² In one such address, Benedict claimed that from the anthropological truth of marriage "it is possible to work out an authentic juridical anthropology," affirming that "with regard to the subjective and libertarian relativization of the sexual experience, the Church's tradition clearly affirms the natural juridical character of marriage, that is, the fact that it belongs by nature to the context of justice in interpersonal relations" (Pope Benedict XVI, Address for the Inauguration of the Judicial Year of the Tribunal of the Roman Rota, January 27, 2007). Thus, following his argument, the human good of marriage (*res*) belongs by nature (as the juridical title) to the context of justice in interpersonal relations (*res iusta*).

⁵³ Pontifical Academy of Social Sciences, *Catholic Social Doctrine and Human Rights: Final Statement of the 15th Plenary Session, 1–5 May 2009*, ed. Ombretta Fumagalli Carulli, Roland Minnerath, and Vittorio Possenti (Vatican City: Pontificia Academia Scientiarum Socialium, 2009), 13.

⁵⁴ "The central assumption of the Catholic Magisterium is that human rights are void when their ties with duties are broken" (Pontifical Academy of Social Sciences, *Catholic Social Doctrine and Human Rights*, 14).

[The secular anthropologies which present an evolutionistic and constructivistic background] have come to somewhat abuse the notion of right, intended in a very flexible sense. A right, however, does not derive from a wish or a passion, but is the just measure of what is due to a person in his or her relationship with other people or with the institutions. This measure is correct not because of an arbitrary decision, but because it originates from the natural order of things.⁵⁵

Finally, in his seminal work on CSD, Joseph Höffner affirms that “by ‘right’ those values are understood to which the individual and the society are entitled as ‘theirs,’” because “certain goods are assigned as [their] own.” Höffner labels this position on the essence of right as “objective right.”⁵⁶ The title-holder of objective right has, thus, a claim to those values or goods that are encompassed by the term “objective right.”⁵⁷

After reviewing the arguments which refute a subjectivist reading of CSD’s rights talk, we must ask a different question. Has an academic study, in line with the arguments enlisted above, addressed the issue of the objective-conceptual view of human rights within the realistic Aristotelic-Thomistic juridical anthropology?

The Juridico-Realistic Conception of Rights as Natural Juridical Goods

Höffner’s argument reported above encapsulates the main elements of a so-called “juridico-realistic” conception of right, principally advocated by two authors: Villey and the Spanish jurist and legal philosopher Javier Hervada. Their juridico-philosophical doctrine is firmly rooted in the project of re-reading classical texts of Aristotle, the Roman jurists, and Thomas Aquinas on the essence of right. The main methodological presupposition of Villey’s and Hervada’s account of human or natural rights is the need for a prior clear understanding of the very concept of right (*ius*).

Villey notes that, in the modern and contemporary juridical mentality, the “objective” sense of the term “right” is usually identified with the concept of *law*, which, in its turn, implies the concept of *positive* law as its

⁵⁵ See Pontifical Academy of Social Sciences, *Catholic Social Doctrine and Human Rights*, 14.

⁵⁶ Joseph Cardinal Höffner, *Christian Social Doctrine*, trans. Stephen Wentworth-Arndt and Gerald Finan (Bratislava, SK: LÚC, 1997), 54.

⁵⁷ Höffner, *Christian Social Doctrine*, 54.

primary association.⁵⁸ This is not Aquinas's position. In the thought of the Angelic Doctor, the law is not, "strictly speaking," the same as *ius*, but is only a rational rule of right—*aliqualis ratio iuris*.⁵⁹ Aquinas identifies the right in the objective sense with the just *thing* itself or with, as Villey sometimes affirms, the "objectively just relation."⁶⁰

If the *ius* is that which is just (in the objective sense), then there is a "that which is just" regarding each thing and person: it is precisely the juridical status, the precise place which justice, in the general order, attributes to each, and therefore, certainly not this advantage, this faculty, this power, which we call the right.⁶¹

The difference between the subjective and objective meanings of right is not purely terminological, nor are these meanings merely interchangeable according to the preferred emphasis on the *thing* itself or on its title-holder. With regard to the very *essence*, or the *primary definition* of the notion of right, the two meanings are, according to Villey, mutually exclusive.

If the right is understood as the juridicized domain of the individual's moral powers, faculties, or liberties regarding certain things as objects of right-claims,⁶² then the premodern meaning of right as the very thing itself "caught" in a relation of justice could eventually end up as easily discarded. If, however, the right is understood as the *just thing itself*, as that thing, good, or value which is attributed or apportioned to its title-holder within a relation of justice, then a subjective meaning of right—"claim-right"—must be relegated to the structural position of a secondary juridical phenomenon, dependent and arising from the primary meaning of right.

⁵⁸ Villey, "Les origines," 229. This is especially the case in the Anglo-Saxon terminology, where "right" is predominantly understood as subjective right while the concept of "objective right" is reserved for denoting "the law." An example of this position may be found in the thought of another legal historian, Tierney, who advocates the thesis that contemporary usage of the concept of "right" may abstain from a classical realistic understanding of *ius* without losing anything significant from juridical argumentation other than mere "emphases," "tone," and "spirit." Once the classical realistic concept of *ius* is regarded as less than essential, Tierney, much like Finnis, seems to envision the concept of "right" within a structural realm of the exclusive interrelation between subjective (natural) *rights* and objective natural (or positive) *law* (Tierney, "Villey, Ockham and the Origin of Individual Rights," in *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* [Grand Rapids, MI: Eerdmans, 2001], 13–42).

⁵⁹ *ST* II-II, q. 57, a. 1, ad 2.

⁶⁰ Villey, "Droit Subjectif I," 146, 148.

⁶¹ Villey, "Les origines," 233.

⁶² Villey, "Droit Subjectif I," 146–147; Villey, "Les institutes de Gaius et l'idée du droit subjective," in *Leçons d'histoire de la philosophie du droit* (Paris: Dalloz, 1957), 186.

According to Villey, there is no doubt that, in the classical, premodern perspective, the latter hierarchy of the meanings of right was the operative paradigm.⁶³

Hervada's interpretation of Aquinas's realistic conception of right closely follows Villey's account, but is more elaborate and arguably more systematic. What constitutes the right or the person's *suum* owed in justice is *the thing itself*.⁶⁴ Of course, the juridical domain is not, ontologically speaking, inherent in the thing *itself*, in *its substance*. The right is the *thing as it is in itself*, but only in so far as it is viewed in the relational aspect of the virtue of justice. This means that the right is that concrete *thing* which is apportionable to a determinate subject as his *suum* by virtue of a juridical title (law, contract, testament, human nature, etc.). However, the relation between the title-holder and the thing is in itself insufficient to explain the nature of the juridical obligation. The constitution of an authentic juridical obligation depends rather upon the inclusion of the property of other-directedness, which belongs to justice in an essential way,⁶⁵ into the scheme of the relation between the title-holder and his *suum*.

Hervada accommodates the property of other-directedness within the relation of justice in the following way: given the fact that the *thing*—the *suum*—is or is able to be in the sphere of power of other persons, different from the title-holder, and susceptible to their interference, all potential subjects of interference become debtors in the relation of justice. In this sense, they “owe” the *thing*—the concrete measure of the title-holder's *suum* as determined by the title—to the title-holder. Hervada claims in this way⁶⁶ to adequately explain the genesis of the authentic juridical obligation while fully retaining Aquinas's essential meaning of right as the just *thing*⁶⁷ itself.

⁶³ Villey, “Droit Subjectif I,” 153.

⁶⁴ Javier Hervada, *Critical Introduction to Natural Right*, trans. Mindy Emmons (Montréal: Wilson & Lafleur Ltée, 2020), 19–20.

⁶⁵ *ST* II-II, q. 58, a. 2; q. 58, a. 12.

⁶⁶ For more details on the main theses of Hervada's doctrine on the essence of right, see: Hervada, *Critical Introduction*, 7–30; Hervada, *Lecciones propedéuticas de filosofía del derecho* (Pamplona: EUNSA, 2008), 165–250.

⁶⁷ Hervada is careful enough to highlight that the “thing,” *res*, or “good” should be understood in the broadest possible sense, as a universal convertible with being, meant to encompass any outward corporeal or incorporeal reality which may be the object of the relation of justice. These terms are not intended as tools for conferring any ontological status to somebody or something. To say, together with Aquinas, that right is essentially the *thing* itself means to already outline the foundations *in re* of the juridical domain. See Hervada, *Critical Introduction*, 19–20, and Jean-Pierre Schouppe, *Le réalisme juridique* (Brussels: E. Story-Scientia,

In Hervada's view, confusing Aquinas's "objective" meaning of right with the Hohfeldian type of subjective right brings about important consequences "especially in the theory of human rights."⁶⁸ If we adopt a "subjectivist" position on the essence of right, then *ius* is seen as inhering exclusively in the sphere of faculties, powers, or liberties of the person, and is thus conceivable *as separable* from the concrete *thing*, from the "object" of the subjective "claim-right."⁶⁹ The *thing* itself (e.g., life, paycheck, house, privacy, picnic basket, authorship, freedom to form the act of assent in matters of faith, etc.) is seen as an essentially non-juridical entity. It may have many philosophical properties. Some "things" may even constitute basic human goods in the moral sense (e.g., life). The juridical domain related to these "things" does not essentially include *them*; right has to be found elsewhere—in the subjective rights of the individual or in the positive law of the state. By contrast, the classical realistic conception of right already implies, *in its very semantics*, the reference to *duties* within an objective state of affairs. It refers to the concrete thing in all its metaphysical givenness—including the order of natural law—precisely as a constituted *right* within the objective order of relations of justice.

How is Villey's and Hervada's doctrine of the essence of right applicable to the conception of human or natural rights? Both authors are inclined to first clearly distinguish natural rights from human rights and then, in a second moment, evaluate the necessary conditions for their interchangeable terminological usage.

Regarding the concept of "natural right," they follow Aquinas's argument that the *res* may itself be attributed, and consequently owed in justice (*iusta*), in virtue of the nature itself (*ex ipsa natura rei*).⁷⁰ According to this doctrine, human nature is the juridical title which attributes certain *basic* or *natural human goods* to persons not only as aspects of human moral perfection or fulfilment, but also as *goods* or *res* owed in justice to those persons as title-holders: *natural juridical goods*.⁷¹ In Hervada's own words:

1987), 154.

⁶⁸ Hervada, *Critical Introduction*, 22.

⁶⁹ Hervada, *Lecciones propedéuticas*, 242–43.

⁷⁰ *ST* II-II, q. 57, a. 2.

⁷¹ For a more detailed account of Villey's approach to this argument, see: Michel Villey, *La formation*, 155–65, 242–48, 592–94; Villey, "Abrégé du droit naturel classique," in *Leçons d'histoire*, 109–65; Villey, *Philosophie du droit*, vol. 2, *Les moyens du droit* (Paris: Dalloz, 1978), 148–49, 155; Villey, "Si la théorie générale du droit," 429. For a more detailed Hervada's account, see Hervada, *Critical Introduction*, 51–70, and *Lecciones propedéuticas*, 471–542.

There are things that are attributed to a person by virtue of the very nature of man—in other words, that his title arises from man's very being—and they are measured according to the nature of things . . . for example, his life, his physical integrity, etc. . . . Each of those things—corporeal and incorporeal—that are attributed to man by nature constitutes a natural right.⁷²

Both Villey and Hervada insist that the value of the human-rights project needs to be assessed within the context of its coherence with the juridico-realistic account of, first, the essence of right and, second, with the connected Thomistic doctrine of natural rights.

The predominant understanding of the project of human rights as an essentially subjective concept resulted in Villey's radical disillusionment with the prospect of accommodating them within a juridico-realistic conception of right and natural right,⁷³ regardless of possible positive aspects within such a project.⁷⁴ In his view, the problem stems not only from an erroneous conception of right but also from a flawed philosophical tradition. He considers the project of human rights to be irreparably corrupt because of its deep-rooted philosophical metastasis, which dates back to the paradigmatic myth of the Hobbesian "state of nature."⁷⁵ The concept of natural right in the Hobbesian "state of nature" scenario is posited in its so-called "pure" state, meaning as an absolute "liberty-right" inherent in the individual's faculties and powers. At the same time, Hobbes's natural right is "caught" within a dialectic tension with the natural law, which is by contrast envisioned as purely moral, and thus essentially *extra-juridical*.⁷⁶ On the other side of the philosophical "coin," Villey maintains that the modern project of the rights of man is hopelessly entangled with individualistic philosophical premises that prevent it from being understood within the properly relational perspective required by

⁷² Hervada, *Critical Introduction*, 51–52.

⁷³ For example, see Villey, *Le droit et les droits de l'homme*, 131–54, and "Le droit dans les choses," 24.

⁷⁴ See Michel Villey, "Polémique sur les 'droits de l'homme,'" *Les Études philosophiques* 2 (1986): 192–94.

⁷⁵ See Villey, *Le droit et les droits de l'homme*, 138–39, and "Polémique," 191. See also, Michel Villey, *La nature et la loi: Une philosophie du droit* (Paris: Éditions du Cerf, 2014), 242.

⁷⁶ See Michel Villey, "Droit Subjectif II (Le droit de l'individu chez Hobbes)," in *Seize essais de philosophie du droit dont un sur la crise universitaire* (Paris: Dalloz, 1969), 189–90, 193–95. See also Villey's treatment of Hobbes's conception of natural right in *La formation*, 559–618.

the virtue of justice. The rights of man are thereby formulated by considering the human person exclusively as an individual, in abstraction from the property of other-directedness.⁷⁷ Since Villey perceives no signs of discontinuity between the twentieth-century rights talk and the modern genesis of the rights-of-man project, he believes that not even a practical consensus on the values protected by these rights could secure their consistent and durable foundations in the changing contexts of the individualist conceptions of the “self.”

Hervada’s approach to the human-rights project is more moderate. He is prepared to accept the possibility of a doctrinal continuity between the juridico-realistic account of the essence of right, the classical tradition of *ius naturale*, and the human-rights project. A clear sign of his openness for establishing such continuity is his explicit reference to human rights as “inherent *juridical* goods.”⁷⁸

Therefore, all the goods inherent to [a person’s] own being are the object of his dominion, are *his* in the most strict and proper sense. With this in mind, it is evident that the set of goods inherent to his being represents *his things*, with which others cannot interfere and which they cannot appropriate; . . . they are, then, rights of the person, rights that the person has by virtue of his nature. They are the natural rights of man in the strictest sense of the word.⁷⁹

Hervada’s positive evaluation of such doctrinal continuity, however, is subject to a condition *sine qua non*: the continuity is operative only within a doctrinal framework where term “right” in “human rights” is understood according to the conceptual hierarchy of the primary and essential (*ipsa res iusta*) and secondary (subjective) meanings of “right.” Subjective rights, as the individual’s faculties or powers to claim *things* (*res*), according to Hervada, certainly occupy an important structural place in the juridical phenomenon. But these rights, including Hohfeldian types of subjective rights, should be envisioned as only a consequence—a manifestation or a

⁷⁷ See: Villey, *Le droit et les droits de l’homme*, 120–21, 154; Villey, “Polémique,” 199; Villey, *La nature et la loi*, 241–42.

⁷⁸ Javier Hervada, “Problemas que una nota esencial de los derechos humanos plantea a la filosofía del derecho,” in *Escritos de derecho natural* (Pamplona, ES: EUNSA, 2013), 157. Hervada even claims that the correct understanding of the essential meaning of right (“*ius*”) must contain a reference to those rights which are called human or natural rights, since these type of rights clearly indicate that the elements of the juridical domain are preexistent with regard to positive law (155–59).

⁷⁹ Hervada, *Critical Introduction*, 54.

derived juridical meaning—dependent upon a prior objective concept of right: the *res* itself within determined relations of justice.⁸⁰ Thus understood, *ius subiectivum*⁸¹ has concrete and positive value. It cannot be reduced to a mere “free-floating” and essentially *instrumental* faculty that subsists only as a juridical extension of the law, natural or positive.

We believe that the evidence gathered from the magisterial *dicta* on human rights, as well as their subsequent academic interpretations, indicates that the notion of human rights in CSD presupposes the conceptual hierarchy inherent in the semantics of *ius*, as proposed by Hervada’s re-reading of the classical texts in the juridico-realistic tradition. There are, thus, three essential elements for CSD’s understanding of human rights. Within the objective-conceptual approach there is, first, right in the objective sense (*ipsa res iusta*) as the Thomistic *primary* meaning of *ius*. Then, second, we have the subjective rights as the *secondary* manifestation of the concept of right. Third, we have the necessary parallel argument on the metaphysical context of natural law within the objectivist-contextual approach. We believe that each time the concept of human rights is invoked within CSD all three elements are simultaneously included within a single coherent argument which suffices to explain the foundations of rights talk.

Having established the first task of this paper—the meaning of the term “human rights” in CSD—we may now turn to our second, closely connected task. How is the conceptual continuity of rights talk integrated within the whole of CSD, and what are the contours of the specifically juridical domain inherent in the principles of CSD?

The Juridical Domain of the Principles of Catholic Social Doctrine

The four principles of CSD are: the principle of the dignity of the human person, the principle of the common good, the principle of subsidiarity, and the principle of solidarity.⁸² A complete presentation of the argument for the juridical domain pertinent to these principles exceeds the proportions of this work. We shall instead limit ourselves to an outline of some of

⁸⁰ Hervada, *Critical Introduction*, 22–24. See also Hervada, *Lecciones propedéuticas*, 243: “[The concept of right as the just thing] generates in the title-holder of the right the possibility to demand the handover of the thing or the respect of the right. . . . Therefore, subjective rights exist and are a constitutional factor or element of the right. But they are not autonomous from the right; subjective rights are one of its manifestations.”

⁸¹ For a useful study on the genesis of the concept of subjective right, see Alejandro Guzmán Brito, “Historia de la denominación del derecho-facultad como ‘subiectivo,’” *Revista de Estudios Histórico-Jurídicos* 25 (2003): 407–43.

⁸² *Compendium of the Social Doctrine of the Church*, §160.

the main topics where such domain comes into particular focus and which have not yet received sufficient academic attention.

The Principle of Human Dignity

With regard to the first principle, CSD holds that human rights represent a conceptual and doctrinal response to the demands of human dignity;⁸³ they are rooted in human dignity⁸⁴ and correspond to the demands of human dignity.⁸⁵ These general claims establish that human rights should be considered as a juridical domain inherent to the anthropological content of human dignity. But how exactly is it inherent?

In his message for the World Day of Peace in 1999, John Paul II affirmed that “to promote the good of the individual is thus to serve the common good, which is that point where rights and duties converge and reinforce one another.”⁸⁶ He added that human rights are directed “towards the promotion of every aspect of the good of both the person and society.”⁸⁷ CSD seems to understand the *individual* and *common good* as the *loci* of human dignity that are particularly relevant for the constitution of the juridical domain.⁸⁸

At the same time, CSD firmly establishes that “the natural law expresses the dignity of the human person and lays foundations of the person’s fundamental duties.”⁸⁹ Elsewhere, the natural law is said to provide the basis for the dignity of the human person, for the common good, and for the human rights.⁹⁰ Moreover, in its 2009 *In Search of a Universal Ethic: A New Look at the Natural Law*, the International Theological Commission (ITC) document affirms that “the rights of the human person . . . emerge from the order of justice,” and that “to acknowledge these natural rights of man means to acknowledge the objective order of human relations based on natural law.”⁹¹

Hence, the juridical domain pertaining to the principle of the dignity of the human person seems to be connected to the correct balance within the interplay of the following elements: human rights as natural *juridical*

⁸³ *Compendium of the Social Doctrine of the Church*, §152.

⁸⁴ *Compendium of the Social Doctrine of the Church*, §153.

⁸⁵ *Compendium of the Social Doctrine of the Church*, §154.

⁸⁶ Pope John Paul II, Message for the Celebration of the World Day of Peace, January 1, 1999, §1.

⁸⁷ John Paul II, Message for World Day of Peace 1999, §3.

⁸⁸ *The Compendium of the Social Doctrine of the Church*, §388–389, 391.

⁸⁹ *Compendium of the Social Doctrine of the Church*, §140.

⁹⁰ Pope John Paul II, Encyclical letter *Evangelium Vitae* (1995), §70.

⁹¹ ITC, *In Search of a Universal Ethic: A New Look at the Natural Law*, §92.

goods, the individual and common human good, and the precepts of the natural law.⁹² What CSD does not do is present an explicit, detailed, and fully developed argument on the nature of this balance.

In any case, it is clear from the foregoing that one of the central questions regarding the juridical domain of the principle of human dignity concerns the *juridical domain of natural law*. Both Villey and Hervada have contributed to the discussion of that question. A simplified but nonetheless sufficiently clear formulation of their argument on this topic can be made as follows: The precept of natural law points to certain natural human goods as the necessary aspects of the person's moral perfection and fulfilment.⁹³ However, this same precept of natural moral law may be considered under the aspect which is decidedly juridical. When such a precept is seen as the source of attribution of certain natural human goods to persons as their title-holders and these goods are at the same time seen as consequently owed by other determinate subjects in a relation of justice, it is actually reconstituted as a precept of "*juridical natural law*."⁹⁴

A precept of natural law, considered in its juridical aspect, contains the order of *that which is just* according to human nature. It is essentially a *natural* norm, in the sense that it is promulgated through nature itself. Therefore, we may propose an alternative term for this "juridical" natural law: "natural norms of justice." This term is actually already present within the academic treatment of human rights and the natural law in the texts of some of the commentators of CSD.

The supreme juristic principles are that part of natural law which is concerned with the establishment of the social order. In Latin

⁹² The law in general, and thus also natural law, is defined by Thomas to be "an ordinance of reason *for the common good*, made by him who has the care of community, and promulgated" (*ST* I-II, q. 90, a. 4; emphasis added).

⁹³ See *ST* I-II, q. 94, a. 2: "Whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided. Since, however, good has the nature of an end, . . . hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit."

⁹⁴ For example, see: Hervada, *Critical Introduction*, 94–95, 119–130; Hervada, *Lecciones propedéuticas*, 522, 531–32, 586; Hervada, *What is Law? The Modern Response of Juridical Realism: An Introduction to Law*, trans. William L. Daniel (Montréal: Wilson & Lafleur Ltée, 2009), 116, 143–44. For Villey's implicit, but still sufficiently clear, argument on the juridical domain of natural law, see Villey, *La formation*, 593; Villey, *Philosophie du droit*, 2:154; Villey, "Si la théorie générale du droit," 429; Villey, "La nature des choses," in *Seize Essais de philosophie du droit dont un sur la crise universitaire* (Paris: Dalloz, 1969), 50.

this part is termed “*ius naturale*” distinct from “*lex naturalis*,” the natural law in general. In English we might perhaps call it natural juristic law, just as we speak of natural moral law.⁹⁵

Interestingly enough, the 2009 ITC document presents an understanding of the specifically juridical domain constituted within the normative structure of natural moral law as *one aspect* of the meaning of the term “natural right” (*ius naturale*). The English translation of *ius naturale* is rendered in plural: “norms of natural justice.”⁹⁶

The Principle of the Common Good

In order to fully understand the juridical domain pertinent to the principle of the common good, we should first precisely delimit the principle’s meaning. *The Compendium of the Social Doctrine of the Church* frequently mentions what it calls the “primary and broadly accepted”⁹⁷ definition of this principle:

The common good indicates the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfilment more fully and more easily. The common good does not consist in the simple sum of the particular goods of each subject of a social entity. Belonging to each person, it is and remains “common,” because it is indivisible and because only together it is possible to attain it.⁹⁸

Hittinger, in his studies on the social ontology of group-persons or communities, provides an alternate definition of the meaning of the common good, one which complements the *Compendium*’s definition.

⁹⁵ Johannes Messner, *Social Ethics: Natural Law in the Modern World*, trans. J. J. Doherty (St. Louis, MO: B. Herder, 1949), 156–57.

⁹⁶ ITC, *In Search of a Universal Ethic*, §83: “[There is an] essential distinction between natural law [i.e., *lex naturalis*] and the norm of natural justice [i.e., *ius naturale*].” The document continues: “The norm of natural justice is the inherent standard of the right interaction among members of society. It is the rule and immanent measure of interpersonal and social human relations” (§88); “The norm of natural justice . . . articulates the judgement of practical reason in its estimation of what is just. Such norm, as the juridical expression of the natural law in the political order, thus appears as the measure of the just relation among the members of the community” (§90).

⁹⁷ *Compendium of the Social Doctrine of the Church*, §164.

⁹⁸ *Compendium of the Social Doctrine of the Church*, §164.

He holds that the common good is, in a sense, twofold. In its strict sense, it denotes the desired form of order of communal action, or the common good of shared action. Hittinger calls this the *intrinsic* common good. In addition, the common good includes the end (or ends) sought through the entrance into a societal union as its member. Hittinger calls this aspect the *extrinsic* common good.⁹⁹

On Hittinger's account, "the salient mark of a *bonum commune* is that it cannot, just as such, be distributed or divided in exchange, but only participated by its members."¹⁰⁰ The common good of a society "cannot be distributed or cashed-out," because it really "never exists as a private good, and therefore when someone exits a marriage or a polity he cannot take away his private share."¹⁰¹ A societal union—the common order itself—is not divisible.¹⁰² "Like any true friendship, there is only one way to have it—to participate in it by action."¹⁰³

In both of Hittinger's mutually complementing¹⁰⁴ definitions, the common denominator is the *indivisibility* of the common good. On the other hand, the constitution of the juridical domain is precisely dependent on the fact that a "thing" (*res*) is somehow *divisible* in order to be apportioned to determinate persons as their juridical *suum*, as something that is

⁹⁹ Russell Hittinger, "Love, Sustainability, and Solidarity: Philosophical and Theological Roots," in *Free Markets with Solidarity and Sustainability: Facing the Challenge*, ed. Martin Schlag and Juan A. Mercado (Washington, DC: Catholic University of America Press, 2016), 23. A similar account of the internal differentiation of layers within the concept of common good is given by Dominic Farrell: "Furthermore, given the nature of communities and unified wholes, the common good consists of a twofold ordering or disposition of their members. On the one hand, it consists of the intrinsic ordering of the community: ordering the members among themselves in such a way that a working, unified whole is brought about. . . . On the other hand, the common good lies ultimately in the end of community and its attainment. Indeed, the common good qua order intrinsic to the community derives from and is directed toward the common good qua end" ("Wanting the Common Good: Aquinas on General Justice," *The Review of Metaphysics* 71 [2018]: 522–23).

¹⁰⁰ Russell Hittinger, "Divisible Goods and Common Good: Reflections on *Caritas in Veritate*," *Faith & Economics* 58 (2011): 39–40

¹⁰¹ Russell Hittinger, "The Coherence of the Four Basic Principles of Catholic Social Doctrine," *Nova et Vetera* (English) 7 (2009): 800.

¹⁰² Hittinger, "Coherence of the Four Basic Principles," 830.

¹⁰³ Hittinger, "Love, Sustainability, and Solidarity," 24.

¹⁰⁴ V. Bradley Lewis labels the first definition the "instrumental account of the common good" ("Is the Common Good an Ensemble of Conditions?," *Archivio di filosofia* 84 [2016]: 124). In this optic, the second definition would, perhaps, amount to an "essentialist" account of the common good.

“mine” or “ours” as opposed to “yours,” or for that matter, anybody else’s.¹⁰⁵ In order to be *apportionable*, a certain “thing” must be attributable to a person *not* primarily in view of his moral perfection, but precisely under the aspect of its being apt to enter into the sphere of the person’s *suum* and, consequently, of constituting other persons’ correlative debt in justice.

Where does this leave us with regard to the juridical domain of the principle of the common good? Even though the indivisible common good cannot, as such, constitute anyone’s juridical *suum*, the juridical domain may still be predicated of those “things” (*res*) which represent *apportionable* channels of attaining the common good of particular societies. For example, the common good of shared action within the family is indivisible, transcending the possibility of constituting a juridical good. It is essentially participative, and it pertains to the domain of morality. But some of its aspects may be apportioned as the members’ *suum*.¹⁰⁶ With regard to the good of transmission of values within a family, which certainly represents an aspect of its common good, the juridical domain may be constituted as the juridical good of parents’ role as the primary

¹⁰⁵ When speaking about natural rights, Hervada affirms that “what we call the nature of things must refer to dimensions that can be *valued or measured*” (*Critical Introduction*, 59). See also: Hervada, *What is Law?*, 16, 18; Hervada, “Apuntes para una exposición del realismo jurídico clásico,” *Persona y Derecho* 18 (1988): 284–85.

¹⁰⁶ For example, the Pontifical Council for the Family’s *Charter of the Rights of the Family* (1983) enumerates those rights of the person which, “even though they are expressed as rights of the individual, have a fundamental social dimension.” The Charter also highlights the fact that “the family, a natural society, exists prior to the State or any other community, and possesses inherent rights.” The intrinsic and extrinsic common good of the family is indivisible and, as such, cannot be readily constituted as right. Members of the family can only participate in its common good. The rights mentioned in the Charter, however, represent examples of what we here refer to as “apportionable channels” of attaining the common good of the family. These rights are not the common good in itself. They do, however, represent certain *juridical* goods which are naturally inherent to the individual person as a member of the family, or to the family itself as a group-person. On the other hand, the apportionable channels of the common good should be distinguished from and are not reducible to common *goods* (common utilities as means, or, as Finnis calls them, “common stock,” the incidents of common enterprise). Common *goods* are divisible—material or structural—preconditions which are made common for the fulfilment of the common good in the strict sense. For more details on “common goods” or “common stock,” see: Russell Hittinger, “Polity in Catholic Social Doctrine: Some Recent Perplexities,” in *Religion and Civil Society: The Changing Faces of Religion and Secularity*, ed. Mary Ann Glendon and Rafael Alvira (New York: Georg Olms, 2014), 42–43; Finnis, *Natural Law and Natural Rights*, 194; Gregory Froelich, “The Equivocal Status of *Bonum Commune*,” *The New Scholasticism* 63 (1989): 53–55.

educators of their children according to their own philosophical or religious convictions. Hittinger makes a similar argument when he claims that “recognizing the natural right of parents as 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.”¹⁰⁷ In our present argument, however, we are taking his claim a step further. We claim that, in the juridico-realistic conception of right, natural rights are relatable to the common good precisely because they, as natural juridical goods, form some of the apportionable channels of the common good. In this sense, the juridical domain of the common good subsists both *ad extra*, with regard to other individuals and group-persons, and *ad intra*, among the members themselves of particular societies.

The Principle of the Subsidiarity

In CSD, the principle of subsidiarity is usually defined as the imperative that “social entities *properly* perform the functions that fall to them without being required to hand them over unjustly to other social entities of a higher level, by which they would end up being absorbed and substituted, in the end seeing themselves denied their dignity and essential place.”¹⁰⁸

One of the key terms in this definition is the reference to the proper level of communal action. As Hittinger correctly notes, the principle of subsidiarity secures that the *munera*, which are essential for the attainment of a society’s specific common good, are performed by this society at its *proper* level of action, and hence not necessarily at the “lowest possible” level:

Subsidiarity. . . presupposes that there are plural authorities and agents having their “proper” (not necessarily, lowest) duties and *rights* with regard to the common good.¹⁰⁹

If the claim that societies have their proper *rights* with regard to the common good is to be properly understood, such rights must be seen in light of what are the proper *duties* referenced above. We have already seen that the natural norms of justice (i.e., the juridical aspect of natural law) orient the individual person to certain natural juridical goods, which are, in turn, owed in justice by others. Aside from this, the natural norms of

¹⁰⁷ Hittinger, “Coherence of the Four Basic Principles,” 830.

¹⁰⁸ *Compendium of the Social Doctrine of the Church*, §186 (emphasis added).

¹⁰⁹ Russell Hittinger, “The Coherence of the Four Basic Principles of Catholic Social Doctrine,” 825.

justice also point to certain juridical goods whose title-holder is a certain group-person as a *sui generis* unity of order, and which are related to that group-person's attainment of the common good.¹¹⁰ Hence, certain "proper" moral "duties" regarding the attainment of the common good are constituted as the group-person's "proper rights" or juridical goods.

The nucleus of the principle of subsidiarity—the imperative that each group-person maintains its own specific "proper" level of dynamics toward attaining its common good—implies, at the same time, a framework of duties related to these dynamics, but also a right. The principle of subsidiarity is not only a principle of social ontology or social *ethics*;¹¹¹ it also possesses an inherent *juridical* domain, a so-called "subsidiary right."¹¹² The very good of each society's *proper* level of activity for the attainment of the common good constitutes a juridical good, which may not be interfered with or be illegitimately appropriated by other individual or group agents.¹¹³ For example, the state, or a university, or a church cannot legitimately appropriate the juridical goods that comprise the apportionable channels of attaining the common good *proper* to a family if that family is capable of pursuing its common good at its own proper level of action.

The Principle of Solidarity

The principle of solidarity is defined by CSD as the fundamental virtue of social morality which considers the "firm and persevering determination to commit oneself to the common good [precisely as the] good of all and of each individual, because we are all really responsible for all."¹¹⁴ It thus expresses the adequate mode of *communicatio* itself—of making something

¹¹⁰ For example, as we already saw, the *Charter of the Rights of the Family* highlights that "the family, a natural society, exists prior to the State or any other community, and possesses inherent rights" ("Preamble").

¹¹¹ See Russell Hittinger, "Social Pluralism and Subsidiarity," 395: "Subsidiarity does not tell us who has which function or munus. One has to look elsewhere (natural law . . .) for the munera. Therefore, subsidiarity cannot be used to settle the debates about the ontology or the distribution of munera; rather, it is a principle governing the relations of already distributed functions."

¹¹² Höffner notes that it was Bishop Emmanuel von Ketteler who first spoke of "subsidiary rights" as the "right [of people] to accomplish themselves what they can do in their homes, in their communities" (*Christian Social Teaching*, 53).

¹¹³ In short, my claim is that John Paul II's argument that "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving it of its functions which properly belong to it" (*Centesimus Annus*, §48) is not only a claim of social morality or social ontology of group-persons but also a juridical claim.

¹¹⁴ *Compendium of the Social Doctrine of the Church*, §193.

common, where one rational agent participates in the life of another¹¹⁵—within any society which possesses an intrinsic common good.

Another way of understanding solidarity is as “social love.”¹¹⁶ The quality of the social bond—an intrinsic common good—is reflected in the fact that the bond is “loved” for its own sake. There is no other way to attain the intrinsic common good except by participating in it through various modes of “social love.”¹¹⁷

Now, just as the common good is indivisible, so too its dynamic aspect—the mode of participating in its *communicatio*, “social love”—is indivisible. For that reason, solidarity is not readily apportionable for specifically juridical purposes. Participation in the quality of “social love” or “friendship” within a society is the primary aspect of solidarity. The common good is a matter of “things” (*res*) owed in justice only in a secondary and mediate way.

Could we nonetheless pinpoint an argument that represents the specific juridical domain of solidarity (besides the ones already identified in close connection to the first three principles)? The principle of solidarity aims precisely at the *adequate quality* of relations which constitute the intrinsic common good. Is there any way in which this quality of intrasocietal relations may be interfered with at the level of (dis)respect for a debt in justice? One of the examples that comes to mind is the case of a higher society (e.g., the state) that attempts to substitute, by laws or policies of social pressure and on an all-encompassing *conceptual level*, the proper quality of the very bond of “social love” with some reduced and mandatory vision of the moral quality of communal life itself.¹¹⁸ The recognition of

¹¹⁵ See Russell Hittinger, “Reasons for Civil Society,” in *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (Wilmington, DE: ISI Books, 2003), 271.

¹¹⁶ See Russell Hittinger, “The Process of ‘Creative Destruction’ and Subsidiarity: A Response to professors Archer and Donati,” in *Crisis in a Global Economy: Re-Planning the Journey*, ed. José T. Raga and Mary Ann Glendon (Vatican City: Pontificia Academia Scientiarum Socialium, 2011), 170: “The common good motif is best considered under the principle of love.”

¹¹⁷ John Paul II refers to various terms in which solidarity was expressed in CSD, like “social charity,” “friendship,” or “civilization of love” (*Centesimus Annus*, §10). See: Russell Hittinger, “Social Inclusion Beyond Exchanges and Distributions,” in *Towards a Participatory Society: New Roads to Social and Cultural Integration*, ed. Pierpaolo Donati (Vatican City: Libreria Editrice Vaticana, 2018), 247; Hittinger, “Love, Sustainability, and Solidarity,” 19–23.

¹¹⁸ Hittinger frequently points to an example in which modes of solidarity may be completely absorbed—on a general, conceptual level—within a singular, paradigmatic social category (e.g., citizenship) in the totalitarian regimes. He calls it

social love as the adequate mode of relational dynamics for the attainment of the common good may therefore be understood to constitute a natural juridical good of societies.

The Juridical Implications of Pope Francis's Guidelines for the Application of the Principles of CSD

Pope Francis has, during the course of his pontificate, inaugurated four principles or guidelines which are derived from the four fundamental principles of the CSD. These principles seek to address the tensions inherent in every social reality and “guide the development of life in society and the building of a people where differences are harmonized within a shared pursuit.”¹¹⁹ These principles or guidelines are: time is greater than space; unity prevails over conflict; realities are more important than ideas; and the whole is greater than the part.¹²⁰ We may omit from our analysis the first of those four, since it predominantly considers the more practical and dynamic aspect of the development of processes across time. We shall also omit from consideration the third principle (“realities are more important than ideas”), since we have already mentioned a possible implication of this principle for the correct understanding of the *realistic* concept of “right” with respect to certain conceptions of subjective rights (i.e., those which posit an inherent structural *detachment from the realistic givenness* of the objects of subjective rights).

We are, therefore, left with two principles which seem to raise certain important questions regarding the constitution and adequate understanding of the juridical domain. We believe that these two principles may

the “monistic notion of solidarity” (Hittinger, “Making Sense of the Civilization of Love: John Paul II’s Contribution to Catholic Social Thought,” in *The Legacy of Pope John Paul II: His Contribution to Catholic Thought*, ed. Geoffrey Gneuhls [New York: Crossroad, 2000], 74–77).

¹¹⁹ Francis, *Evangelii Gaudium*, §221.

¹²⁰ Francis, *Evangelii Gaudium*, §§ 221–37. Francis developed an outline of these principles during the 1970s, taking inspiration especially from Romano Guardini’s understanding of social realities through “polar oppositions.” See: Austen Ivereigh, *The Great Reformer: Francis and the Making of a Radical Pope* (New York: Henry Holt, 2014), 142–43; Massimo Borghesi, *The Mind of Pope Francis: Jorge Maria Bergoglio’s Intellectual Journey* (Collegeville, MN: Liturgical Press, 2018), 57–130. In a very insightful comment, Barrett Turner affirms that the basic idea of these guidelines is that “a healthy synthesis of opposites in a living thing, including civil society . . . will not destroy or collapse the contrast into one side or another [but,] rather, by embracing the polarity, the organism comes most fully alive” (“*Pacis Progressio*: How Francis’s Four New Principles Develop Catholic Social Teaching into Catholic Social Praxis,” *Journal of Moral Theology* 6 [2017]: 120).

be viewed as a single composite principle. The composite social tension is expressed through the contrast between “unity” and “whole,” on one side of the tension, and “conflict” and “part” on the other. According to Pope Francis, conflict must be engaged and transcended in view of a unity. If reality is viewed exclusively through the lens of conflict, our sense of its profound unity may be lost, and persons end up projecting onto institutions their partial conflictual agendas. By contrast, Francis holds that conflict may be resolved, and that communion may be built amid disagreement.

The way to achieve unity and the resolution of conflict has, in his view, the following elements: the resolution of conflict takes place on a higher plane; the resolution thereby preserves what is valid and useful on both sides of conflict; persons on both sides of the conflictual arena are seen in their deepest dignity; and the structure of resolution maintains its openness for the attitudes of true solidarity and social peace among parties in conflict. The achieved unity (the synthesis or the whole) is diversified, and greater than the sum of its parts, although the polar tensions are not thereby eliminated, but remain active. The unity embraces all persons in a society who seek its common good, and whose “cultural covenant” has the form of a “reconciled diversity.”¹²¹ To depict this argument, Francis famously uses the image of the “polyhedron,” whose structure “reflects the convergence of all its parts, each of which preserves its distinctiveness.”¹²²

If we are reading Francis’s argument correctly, the Pontiff is providing the criteria for CSD’s engagement with those aspects of social conflicts which have an inherent juridical domain, those which necessarily demand the assessment of the juridical goods in question. A paradigmatic contemporary example of such conflict is precisely the social tension between different, seemingly irreconcilable and mutually exclusive visions regarding certain natural juridical goods (human rights) and the common good itself of political society. Against contemporary tendencies of viewing the political common good as an oppressive hierarchy, or otherwise as merely an optional utility,¹²³ Francis maintains that the unity of the political common good may and should be achieved.

¹²¹ Francis, *Evangelii Gaudium*, §230.

¹²² Francis, *Evangelii Gaudium*, §236. A “polyhedron” is brought up here in contrast to the model of the sphere, which is “no greater than the sum of its parts, where every point is equidistant from the centre, and there are no differences between them.”

¹²³ For a diagnosis of the contemporary situation regarding the political common good, see Hittinger, “Social Inclusion,” 256–57.

Francis's account of the elements necessary to achieve unity by means of transcending the conflict are very similar to the application of the principle of toleration. Toleration¹²⁴ is ordinarily understood as a resolution of the conflict between a social norm and certain contrasting behaviors through the optic of a twofold normative system. The first part of this twofold normative system, called the "basic normative system," is the part where certain acts which are the occasion of social conflict are prohibited. The other part, the "justifying normative system," consists of the criteria for evaluation of the (non)existence of "superior" reasons for the toleration of those acts.¹²⁵

According to the dominant contemporary understanding of the concept of toleration, paradigmatically represented in John Rawls's thought,¹²⁶ the principle of toleration "must be applied to political philosophy itself."¹²⁷ The citizens should be left to settle the disputed questions of religion, philosophy, and morality themselves, in accordance with views they firmly hold.¹²⁸ This means that, in a system deeply marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines, the grounds of toleration should be settled in abstraction from any particular conception of the good. A conception of human rights founded upon the doctrine of natural juridical goods would most certainly be qualified as a *particular* conception of the good unsuitable for a Rawlsian social consensus. To apply the principle of toleration to political philosophy itself means to create a conception of justice which is purely *political*—and not metaphysical—and from which all particular conceptions of good are equally distant.¹²⁹

¹²⁴ We shall analyze the concept of toleration only in its "vertical public" understanding, that is, within the juridical and policy-based relationship between the state, on one hand, and individuals or social groups, on the other. For the concept of vertical public toleration, see: Ernesto Garzón Valdés, "Some Remarks on the Concept of Toleration," *Ratio Juris* 10 (1997): 127–30; Fabio Macioce, "Toleration as Asymmetric Recognition," *Persona y Derecho* 77 (2017): 228.

¹²⁵ The outline of this scheme of toleration is provided in Valdés, "Some Remarks," 127–38.

¹²⁶ See Rainer Forst, *Toleration in Conflict: Past and Present*, trans. Ciaran Cronin (New York: Cambridge University Press, 2013), 468: "No other work in recent political philosophy has accorded the connections between justice and toleration greater prominence than John Rawls's *Political Liberalism*, a work which has earned a special place in the further development of the modern discourse of toleration."

¹²⁷ John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 9–10.

¹²⁸ Rawls, *Political Liberalism*, 154.

¹²⁹ See: Rawls, *Political Liberalism*, 3–4; Rawls, "Justice as Fairness: Political, not

Rawls's idea of toleration seems to be in direct contrast to Pope Francis's guidelines, especially when these are read in the light of CSD's previous statements regarding toleration.¹³⁰

First, Francis's conception of toleration as resolution of conflict on a "superior" level, in our opinion, does not imply a juridical superiority of the justifying normative system, in the sense of hierarchical superiority of legal sources. The natural norms of justice, and the natural juridical goods which these norms point to, are present in *both* the basic normative system and the justifying normative system. Other criteria for deliberation, like reasons from prudence or from contextual, social states of affairs, are introduced in the justifying normative system. This does not mean that the natural juridical goods are necessarily trumped by these additional reasons; quite the contrary. But it does mean that, in Francis's words, "others are seen in their deepest dignity."¹³¹ At the same time, one understands that "the locus of this reconciliation of differences is within ourselves [in Italian: 'one's own inner world'; *la propria interiorità*], in our own lives, ever threatened as they are by fragmentation and breakdown [in Italian: 'dialectical dispersion'; *dispersione dialettica*]."¹³² Thus, Francis's argument actually restates the traditional thread of CSD's view of toleration by highlighting one of its essential elements: putting oneself in the position of others.¹³³

Metaphysical," *Philosophy and Public Affairs* 14 (1985): 223, 231; Rawls, *Law of Peoples: with The Idea of Public Reason Revisited* (Cambridge, MA: Harvard University Press, 1999), 16, 152, 176.

¹³⁰ CSD's exemplary approach to the integration of the idea of toleration and the doctrine of natural rights as natural juridical goods is often expressed in arguments regarding the juridical good of marriage: "Although legislation may sometimes tolerate morally unacceptable behaviour, it must never weaken the recognition of indissoluble monogamous marriage as the only authentic form of the family" (*Compendium of the Social Doctrine of the Church*, §§228–29). See also John Paul II, *Evangelium Vitae*, §71; Congregation for the Doctrine of Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (2003), §§5–7, 9; Pontifical Council for Justice and Peace, *Contribution to World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001), §§15, 18–19, 21. For a Thomistic synthesis of the elements pertinent to this argument, see: *ST* I-II, q. 91, a. 4; q. 96, aa. 2–3; II-II, q. 10, a. 11; J. Budziszewski, *True Tolerance: Liberalism and the Necessity of Judgement* (New Brunswick, NJ: Transaction, 1992); Budziszewski, "Tolerance and Natural Law," *Revue générale de droit* 29 (1998): 233–38; Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (New York: Oxford University Press, 1993), 28–47.

¹³¹ Francis, *Evangelii Gaudium*, §228.

¹³² Francis, *Evangelii Gaudium*, §229.

¹³³ For this element of toleration, see Valdés, "Some Remarks," 137.

Second, in Francis's framework, the "superior" level is not related to hierarchical superiority between levels of normative systems, but to the superiority *over conflict*. "If we remain trapped in conflict," he argues, "we lose our sense of the profound unity of reality."¹³⁴ This may be the cause of losing the ability to see the other in his deepest dignity, even if his acts and life-options are contrary to the norm of the basic axiological system. On the other hand, the Pontiff rather clearly affirms that the resolution on a superior level does not mean "to opt for a kind of syncretism, or for the absorption of one into the other," but only to "preserve what is valid and useful on both sides."¹³⁵

Thus, Francis's model of the polyhedron reflects the true nature of toleration as a concept inherently marked by *polar tensions*: on one side we have the *juridical* validity of natural juridical goods, and on the other side we have acts and life-structuring options which are contrary to that which is naturally just. Both sets of arguments enter into the deliberation on the existence of reasons for toleration. At the end of the process of evaluation, on a level superior to the conflict, the natural juridical goods are preserved, and the other is seen in his deepest dignity—regardless of the fact that his act or his life-structuring option is ultimately not juridically, but only factually tolerated while never becoming accommodated as permissive from the aspect of public morality. This is something completely different from Rawls's idea of toleration where the model is actually the sphere: each comprehensive conception of good is nominally equidistant from the center, from the political conception of justice.¹³⁶

Another aspect of CSD's doctrine on a juridical approach to toleration merits further reflection in this regard. Most of the research on toleration

¹³⁴ Francis, *Evangelii Gaudium*, §226.

¹³⁵ Francis, *Evangelii Gaudium*, §228. In his earlier, 1989 article, Jorge Maria Bergoglio claimed that syncretism may seem attractive as a way of reconciling the conflicts, but the polar tension is never really engaged with. He then concludes by saying that syncretism is the most hidden form of modern totalitarianism, because it promises reconciliation without the reference to substantive values which transcend the conflict; see Jorge Maria Bergoglio, "Necessità di un'antropologia politica: un problema pastorale," in *Pastorale sociale* (Milan: Jaca, 2015), 299–300.

¹³⁶ Unlike Francis's claim that the individual is the locus of the reconciliation of differences, in Rawls's system diversity is relieved by transferring social conflict regarding values at the level of the individual person. The individual should accordingly adopt what is referred to as "schizophrenic personality": "In their private persona [people] possess conceptions of the good [while] in their public capacity as citizens, however, they must divest themselves of these personal commitments" (Richard Bellamy, "Toleration, Liberalism and Democracy: A Comment on Leader and Garzón Valdés," *Ratio Juris* 10 (1997): 180.

outside of CSD usually presents the “justifying normative system” as a *meta-juridical* system of certain *moral* values.¹³⁷ According to CSD, by contrast, the normative aspects of reasons for (or against) toleration may be considered genuinely *juridical* norms (i.e., the natural norms of justice) and not only moral or prudential ones. Applied to the framework where toleration is seen according to a twofold normative system, this means that conflict cannot be resolved only on a *meta-juridical* level of moral or prudential reasons. The natural law, in both its *moral* and *juridical* aspects, forms part of the “basic normative system.” But it is necessarily included in the evaluation of reasons for toleration also as the essential part of the superior “justifying normative system.” The concept of toleration itself thus possesses an inherently juridical domain. No position on toleration regarding an act that is contrary to natural norms of justice may prescind from a foundational reference to these norms. The prudential reasons, and reasons from social contexts, thus, enter into the deliberation process within the justifying normative system *together with* juridical reasons provided by human or natural rights understood as natural juridical goods.

Conclusion

From the outset of this article we highlighted the idea that the concept of human or natural right in CSD necessitates a restatement of the idea of right in the objectivist-conceptual sense, as an argument running parallel to the postulate of the objectivist-contextual, metaphysical setting provided by the natural law. In a recent address to the symposium on the “Fundamental Rights and Conflicts among Rights,” Cardinal Pietro Parolin, the Holy See’s Secretary of the State, reaffirmed the imperative to rediscover “the objectiveness” on which the Church understands human rights. The absence of the objective dimension of human rights, the secretary continued, “causes a short-circuit within rights, which, then, from being universal and objective, become individual and subjective.”¹³⁸ This line of argumentation is congenial to Benedict XVI’s claim that the crisis of the foundations and the phenomenon of multiplication of human rights represents a problem that corrodes “the very concept of right.”¹³⁹

¹³⁷ For example, see: Valdés, “Some Remarks,” 134; Forst, *Toleration in Conflict*, 468–79; Macioce, “Toleration,” 234; Paolo Comanducci, “Sobre el problema de la tolerancia,” *Ideas y Derecho* 1 (2001): 199.

¹³⁸ Cardinal Secretary of the State Pietro Parolin, Intervention at the International Symposium on “Fundamental Rights and Conflicts Among Rights,” November 15, 2018.

¹³⁹ Pope Benedict XVI, “The Multiplication of Rights and the Destruction of the Concept of Right,” in *Faith and Politics: Selected Writings*, trans. Michael J. Miller (San Francisco: Ignatius Press, 2018), 20.

The concept of right may indeed corrode when its content is emptied of the anthropological normative premises. The last half-century has seen many attempts at conceiving the semantics of human rights on a “negative” juridical anthropology—*immunitas*—which posited a freedom of indifference at the core of rights talk. The idea of free-floating freedom recognized a conceptual ally in the all-purpose notion of subjective right. If the legal mentality is to be rebuilt according to a juridico-realistic anthropology, it will have to learn how to bring the structure of “freedom for” back to the core of the very semantics of right. N.V.