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COMPETING CONCEPTIONS OF SUBSIDIARITY

ANDREAS FØLLESDAL

A principle of subsidiarity has gained prominence in law and politics as well as in legal and political theory, on topics ranging from U.S. constitutional interpretation and European integration to the constitutionalization of international law. Its popularity stems from its aspirations to address the allocation or use of authority within a political order, typically those where authority is dispersed between a center and various member units.[1] Subsidiarity places the burden of argument on those who seek to centralize such authority. Increased attention to subsidiarity is due not least to its inclusion in the 1991 Maastricht Treaty on European Union. The Lisbon Treaty applies the principle of subsidiarity to certain issue areas, requiring that the member states should make decisions unless central action will ensure higher comparative efficiency or effectiveness in achieving the specified objectives.[2] A principle of subsidiarity is also urged as a promising "structuring principle" for international law: be it for human rights law in particular,[3] to determine the limits of sovereignty,[4] or possibly for international law more generally.[5] Subsidiarity has also been appealed to in defense of American federalism, and in favor of fiscal federalism and other calls to decentralize authority.[6] It is most recently used to recommend drastic reforms of the European Court of Human Rights.[7]

Alas, the popularity of subsidiarity partly stems from its obfuscation of the central issues. Indeed, considerations of subsidiarity will seldom resolve disagreements about the allocation of authority. A review of the competing traditions of subsidiarity suggests that its more defensible versions instead transpose the contentious issues. Remarkably different conceptions of subsidiarity appear in the U.S. constitutional debate, in the EU setting, by the Catholic Church,

and as applied to international law. Each conception rests on contested premises, and each renders important trade-offs quite differently. These different conceptions and their conflicting implications are too often overlooked. Different historical and theoretical traditions of subsidiarity yield strikingly different and sometimes incompatible implications for the allocation and use of authority within a multilevel social, legal, or political order. Their salient differences concern several features: whether they *proscribe* or *prescribe* intervention by the center, whether they *add* or *remove* issues from the sphere of political decision making, the objective of the larger political and legal order, and whether they place the authority to apply the principle of subsidiarity itself either centrally or with the member units. The upshot is that the different versions drastically reduce or enlarge the scope of member unit authority.

To illustrate how different conceptions of subsidiarity have profoundly different implications for constitutional and institutional design, we first consider four different theories before turning to some implications as seen in the discussions about U.S. federalism, debates in Europe about the EU and the European Court of Human Rights, and international law.

1. Some Theories of Subsidiarity

Alternative versions of subsidiarity have very different implications for the allocation of authority. They differ as to the objectives of the polities, the domain and roles of member units such as states, and the allocation of the authority to apply the principle of subsidiarity. The upshot is that the choice of interpretation has drastic implications for the preferred institutional or constitutional configuration for more legitimate multilevel governance, including the appropriate authority of international institutions vis-à-vis domestic courts. The four accounts sketched in the following draw on insights from Althusius, the American Confederalists, economic or fiscal

federal thought, and Catholic Personalism, respectively.[8] They are briefly sketched in the order that grants the member units less authority. These accounts may regard subsidiarity as *proscribing* or *prescribing* central intervention, apply subsidiarity to the *allocation* of political powers or to their *exercise*, and *add* or *remove* issues from the sphere of political decision making altogether. Some of these features reduce the scope of state authority, while some may protect states against intervention.

Liberty: Althusius

Althusius (1557–1630), "the father of federalism," developed an embryonic theory of subsidiarity drawing on Orthodox Calvinism. He was "syndic" of the German city of Emden in East Friesland and sought to maintain its autonomy in two directions: both against its Lutheran provincial lord and against the Catholic emperor.

Althusius held that communities and associations are instrumentally and intrinsically important for supporting ("subsidia") the needs of individuals. Yet political authority arises on the basis of covenants not among individuals but among such associations. Several features are important for our purposes of delineating conflicting premises and implications of these conceptions of subsidiarity. First, Althusian subsidiarity is strongly committed to immunity of the local unit, such as cities,[9] from interference by more central authorities. Second, this interpretation of subsidiarity appears to take the existing subunits for granted. That is, this account has few limits on how the local authorities treat individuals or other standards of legitimacy. Third, on this view the common good of a political order is limited to respecting member units' immunities and to Pareto improvements among them. That is, this conception only allows undertakings deemed by every subunit to be in their interest compared with their

present status quo. Thus, coercive redistributive arrangements among individuals or associations are deemed illegitimate.

Two weaknesses of this account are worth mentioning. First, it fails to deal adequately with subunits—associations or states—that lack normative legitimacy. Second, it does not apply to situations that require redistribution among member units, for example, according to standards of distributive justice in a federation.

Liberty: Confederalists

Similar conclusions emerge from *confederal* arguments for subsidiarity based on the fear of tyranny. On this view, individuals should be free to choose in matters where no others are harmed. In effect this argument supports a *proscriptive* version of subsidiarity, again limited to Pareto improvements where the member units enjoy veto. This account shares one weakness with the Althusian, namely, its inapplicability to institutions with distributive requirements across member units. Furthermore, it is not at all clear whether this account is correct to focus exclusively on protection from tyranny by central authorities as the sole ill to be avoided. For instance, as Madison pointed out,[10] the plight of minorities *within* a subunit is uncertain, since it is unlikely that smaller units are completely homogeneous. Note that these first two conceptions of subsidiarity are illustrated in "coming together" federations,[11] whose member units join by treaty to secure certain objectives otherwise unattainable. For them, it may be initially plausible to allow only Pareto improvements.[12]

Efficiency: Fiscal Federalism

The third conception of subsidiarity holds that powers and burdens of public goods should be

placed with the populations that benefit from them. Decentralized government is to be preferred mainly because such targeted provision of public goods—that is, "club goods"—is more efficient in economic terms. On this conception, subunits do not enjoy veto powers: free-riding subunits may be overruled to ensure efficient coordination and production of public or club goods. Some limitations of these arguments are that they apply only to such public or club goods, and possibly to Pareto improvements. This conception does not apply easily to cases where the shared objectives include transfers or equalization, and may indeed seem to proscribe central action for such objectives.

Justice: Catholic

The Catholic tradition of subsidiarity merits some more details, given that it is often cited (including in contributions in this volume).[13] The principle of subsidiarity is first expressed, albeit without that name, in Pope Leo XIII's 1891 encyclical, *Rerum Novarum,* which simultaneously sought to protest capitalistic exploitation of the poor and to protect the Catholic Church against socialism. Leo XIII argued that the state should support lower social units but not subsume them: "Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it." Thus a task of the state is to protect workers against the "hardheartedness of employers and the greed of unchecked competition": "[I]t is the province of the commonwealth to serve the common good. And the more that is done for the benefit of the working classes by the general laws of the country, the less need will there be to seek for special means to relieve them." At the same time, "[T]he State must not absorb the individual or the family: both should be allowed free and untrammeled action so far as is consistent with the common good and the

interest of others."[14]

This conception was further developed and named in Pius XI's 1931 encyclical *Quadragesimo Anno* against fascism and its encroachment on the Catholic Church. This account holds that subsidiarity must go "all the way down" to the individual and required central intervention when and only when subordinate organizations cannot act alone: "For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly." The state thus must serve the common interest, and intervene to further individuals' autonomy, as necessary.[15]

This view allows and may require taxation and other means of transfers among member units, including individuals, when required for the "common good" as defined by the authorities. Intervention into member units is legitimate and required when the public good is threatened, such as when a particular class suffers.[16] Subunits thus do not enjoy veto rights. Indeed, interpretation of this subsidiarity principle may also sometimes be best entrusted to the center unit.

This account can also provide standards of legitimacy for member units. For instance, the state must comply with natural and divine law to serve the common interest.[17]

Some weaknesses of this conception are also apparent. Assessment of member units, as well as the proscription and prescription of central action, must draw on a normative conception of the social order and its objectives. In the Catholic version, this includes a conception of the human good as a particular mode of human flourishing, where this is specified on the basis of either a "thick" conception of the good life or an explicitly theological one as willed by God.

Some such normative accounts are contested and difficult to square with commitments to respect a plurality of reasonable conceptions of the good. Where there is disagreement on such matters, this account cannot settle which subunits and cleavages should be embedded, and with what responsibilities—for example, regarding families or labor unions. In constitutions and treaties, such disagreements can be avoided or reduced by express announcement of objectives. But interpretations of these texts must still often draw on further, possibly contested sources.

2. Conflicting Conclusions

We now turn to consider some issue areas where the different conceptions of subsidiarity yield surprisingly different recommendations. Their salient differences stem from several features: whether they place the authority to apply the principle of subsidiarity itself either centrally or with the member units, whether they *proscribe* or *prescribe* intervention by the center, and importantly the objective of the larger political and legal order which *adds* or *removes* issues from the sphere of political decision making. Consider two main issues: Who should have the authority to apply the principle, and which objectives guide the application of subsidiarity—Pareto improvements, human rights, or redistribution across member units? I conclude by illustrating the dilemmas for the European Court of Human Rights, which grants states a "margin of appreciation" justified by subsidiarity.

Who Should Have the Authority to Apply the Principle of Subsidiarity?

One central, contentious issue is: Who should use the principle of subsidiarity to allocate authority or when making policies? Conceptions that favor centralization may leave these issues with the central authorities, such as a central legislature or a central or federal court. Other

conceptions may place the assessment of subsidiarity with the member units. There are two main ways to do so: granting member units veto powers (known from international law among states and from various confederal arrangements), or with a body composed of member unit representatives of some sort.

Consider arguments for placing the authority to apply subsidiarity with the member units, typical of Althusian and fiscal federalist traditions, and central to the treaties that much of international law rests on. First, local authorities are often better equipped to tailor decisions in ways that maximize preference satisfaction, especially when local tastes, preferences, or conditions (such as religious beliefs, geography, resources, or risks) are clustered within one territory. Thus "the production of public goods should be attributed to the level of government that has jurisdiction over the area in which that good is 'public.'"[18] To accord authority to such subsets allows them to act on those preferences and hence increase efficiency.[19] Which such "local public" or club goods and subunits should be established remains largely a matter of local preferences and circumstances.

A second fiscal federalist argument for subsidiarity and local control thereof is that competition among member units may foster further preference maximization under mobility. Competition may be in terms of tax levels, or the nature of the public or club goods. These arguments are further strengthened when individuals can "vote with their feet" toward those member units that best match their preferences.[20] This mechanism is especially effective when mobile factors of production may exit the member units with less favorable conditions, be it higher taxes, fewer resources, or worse living conditions.

Alternative ways to allow member units control is to allow them to check central decisions, or to include them in central decision making—including decisions about subsidiarity.

The former is illustrated by the EU's Lisbon Treaty, which allows a minimum number of national parliaments to appeal EU draft legislative acts that these parliaments believe violate subsidiarity.[21] The latter form of control includes a common judicial body that consists of apex court judges from the member units.[22] A common legislative body may be composed of representatives from each member unit and may enjoy significant power as a second legislative chamber typical of "interlocking" federations.

There are potential drawbacks with allocating authority over subsidiarity decisions both with the member units and with the center. Member units may use their veto to bargain for unfair shares of joint benefits, or ignore externalities of their own decisions.[23] More centralized authority creates risks of undue centralization well known from federal arrangements—threatening their long-term stability.[24] The challenge is to create an institutional design that prevents undue centralization and protects minorities against undue majority rule—while remaining sufficiently flexible to change the allocation of competences to reflect changing social circumstances and new risks.[25]

Objectives: Pareto Improvement, Human Rights, or Just Redistribution?

Some of the most striking differences in impact of subsidiarity arise in political orders with different objectives. Consider the arguments rehearsed earlier about the benefits of fiscal competition. They face at least two central challenges. One concerns how to identify, assess, and address externalities—that is, costs wrought outside their borders. What counts as costs is in part a matter of *which* objectives are recognized as legitimate for the local and central legal orders. Consider cases where one unit creates *competition* by maintaining attractive regulations, for example, lower tax rates and corresponding lower redistributive services to the distraught. Other

units or their citizens may regard such competition as a race to the bottom, insofar as businesses exit and thereby limit the ability to tax. This may count as a negative externality for these other units, but the unit that lowers its tax rate may disagree—if redistribution is not part of its objectives. Whether central action is required is thus in part in the eyes of the beholder, and depends on whether the objectives of the member units include solidarity or other forms of redistribution. A further related weakness of the argument is whether it at all registers the plight of those who have nothing to offer on the market. Consider the needs of those who are dependent on public support. Few if any member units will compete to attract them, since there is no gain to be had. They will in practice be immobile, and be more destitute due to their home unit's reduced tax ability. If their plight counts, such competition will thus violate the Pareto criterion.

The contrast is clear when comparing fiscal federalism and the Catholic conception. The former account of subsidiarity requires all joint action to be Pareto improvements and hence will not permit transfers from one person or group to another except as part of larger package deals. In contrast, Catholic conceptions of subsidiarity draw on more distributive conceptions of the objectives of society. Thomas Aquinas held in *Summa Theologiae:* "Man should not consider his material possessions as his own, but as common to all, so as to share them without hesitation when others are in need."[26] This premise, cited in *Rerum Novarum,*[27] is used in a subsidiarity argument to support central redistribution by the state and other bodies, to secure the needs of the poor. This is obviously at odds with the fiscal federalist conception of subsidiarity, which prohibits such transfers that are contrary to the Pareto principle. The Catholic conception explicitly requires constraints on market exchanges, insisting on the need for public intervention in favor of workers who "have no resources of their own to fall back upon and must chiefly depend upon the assistance of the State."[28]

The upshot is that insofar as federations have such different redistributive objectives, subsidiarity has quite different implications. Some federal constitutions reject material equality or any other form of redistribution. In such cases, the efficiency conception of subsidiarity may apply. For instance, in the case of the United States, the original objectives were arguably explicitly against redistribution: the Constitution writers sought a system of governance that would avoid the rage "for an equal division of property, or for any improper or wicked project."[29] In contrast, several federations and quasi federations include some (re)distributive objectives. Germany's federal constitution requires central action when necessary to ensure "the maintenance of *uniformity of living conditions* beyond the territory of any one land."[30] This includes tax transfers among the member länder. Likewise, but in a weaker form, the Lisbon Treaty for the EU includes among its many objectives "economic, social and territorial *cohesion, and solidarity* among Member States."[31] This puts the EU at odds with the fiscal federalist conception of subsidiarity as laid out by Calabresi and Bickford.[32]

A second challenge to all of these conceptions of subsidiarity concerns the protection of human rights within the member units. This is often regarded as a model case for central action, for instance, to protect the *civil rights* of a minority against the preferences of the majority in a member unit. Such claims seem justified insofar as the authorities of the larger order are unlikely to abuse such permissions. Cases in point in the United States include the abolition of slavery and the end of segregation. Yet Althusian, confederal, and fiscal federalist arguments seem unable to address such concerns, since they tend to proscribe intervention by the center. The Catholic conception is troubled if the list of human rights allows individuals to live contrary to Catholic doctrine.

The confederal conception is unable to address these concerns, since it addresses only

risks of human rights abuses by the center, and thus insists on immunity for member units—leaving individuals at risk from local domination. One strategy for the Althusian or fiscal conceptions is to include among the relevant preferences the distress of residents of other member units wrought by local practices elsewhere that they regard as morally objectionable. But surely Althusius would object that the religious sensibilities of the surrounding majority should not permit infringement of his own religious freedom—the opposite was precisely the point of his theory of subsidiarity. Many would agree with Althusius that such "other-regarding" psychological costs—"external preferences"—should not count.[33] On the other hand, many will agree that polygamy or slavery should not be permitted, regardless of the local preferences.[34] But this stands in some tension with one efficiency argument for decentralized decisions, if not subsidiarity proper: to promote experimentation and hence competition among clusters of club goods. This argument harks back at least to Mill's defense of experiments in living.[35] One of the main challenges to this argument is how to draw the line between experiments in local mores and living, and the violation of rights or vital interests of the "local minorities," as mentioned earlier.[36] Mill remains murky on this issue:

> There is no question here (it may be said) about restricting individuality, or impeding the trial of new and original experiments in living. The only things it is sought to prevent are things which have been tried and condemned from the beginning of the world until now; things which experience has shown not to be useful or suitable to any person's individuality.[37]

So, crucial questions remain unanswered: Which things have been shown not useful or suitable, in which sense, and in whose eyes? In any case, the reason such practices should not be permitted is presumably not a utilitarian calculus of local preference maximization but other moral reasons—which Althusian or fiscal federalist arguments on their own fail to capture.

Indeed, it may be relevant to note that the South African practices of *apartheid* and separation into "homelands" were defended precisely by this tradition of subsidiarity, of "sovereignty in one's social circle."[38]

The Catholic conception of subsidiarity is clearly more equipped to allow interventions in member units for the sake of individuals' interests—including protection of human rights. However, the comprehensive conception of the good found in that particular conception stands in some conflict with several central human rights laid out in treaties or among political philosophers. Examples include freedom of religion extended to non-Catholic faiths, or women's rights in the workplace, rights of lesbians and gays, and rights concerning divorce.

On the ECtHR's Margin of Appreciation

An example that illustrates several of these conflicts among conceptions of subsidiarity is the European Court of Human Rights (ECtHR), which adjudicates the European Convention on Human Rights (Council of 1950).[39] Recent calls for reform of the ECtHR have claimed that its review of domestic legislation must be reined in by considerations of subsidiarity,[40] most recently by the British prime minister.[41]

One central issue concerns which rights should be judged by an international court, and which should be left to the national judiciary—and why. This is largely decided in the relevant treaty and by subsequent court interpretations. The categorization may strike readers as odd: Why should the death penalty, waterboarding, and denials of gay rights be subject to such centralized review, while involuntary subjection to religious symbols such as crucifixes in public schools should not? It makes little sense to insist that subsidiarity requires that as few human rights as possible should be adjudicated by the ECtHR, since the objective of the Convention and

its court is precisely "the maintenance and further realization of human rights and fundamental freedoms" by means of the ECtHR.

A second related issue concerns how and who should demarcate permissible local mores in terms of human rights. In particular, what should be done when there is *doubt* about whether rights have been violated: Should the final judgment be with the member unit, for example, the state, or with the ECtHR, which may possibly grant the national judiciary a "margin of appreciation"—and if so, why? The margin of appreciation is a way to respect domestic democratic processes by the ECtHR judges. One reason is epistemic: these judges are "neither equipped to make detailed investigations inside the States nor are they competent to evaluate all the political and social conditions on the national level."[42] But how broad should that margin be? For instance, the ECtHR leaves it for Italian courts to permit crucifixes, but it overruled Norwegian courts to prohibit some religious instruction in Norwegian schools.[43] How are we to make sense of this, if at all?

Indeed, details of the practice of a margin of appreciation are difficult to square with any of the conceptions of subsidiarity. Studies suggest that the ECtHR applies a broader margin of appreciation when "the protection of morals" and national security are alleged to be at stake, while it allows much less leeway when it comes to matters of discrimination, freedom of expression, or rights to family life.[44] Such distinctions are difficult to defend by appeals to subsidiarity. Critics may also suspect other patterns, namely, that the ECtHR draws the margin of appreciation not only out of deference to legitimate national variations but also in order to avoid conflicts with more powerful states. There is apparently also a practice of narrowing the margin when the judges determine that a standard European practice is emerging, with only a few outlier states. Such patterns are difficult to support by subsidiarity. When determining the proper scope

of "tastes and cultural preferences," why should matters of morals merit more respect for local variation than rights to family life? Why does it matter *how many* states have certain views on these issues? The epistemic hindrances seem similar, and the risks to individuals' likewise.

The upshot is that the list of rights included in the European Convention, and the practice of the margin of appreciation, do not seem principled, and it is difficult to defend them by appeals to subsidiarity.

3. Conclusions

American constitutional federalism, the European Union, Catholic social thought, fiscal federalism, international law, and the practice of the European Court of Human Rights are all sometimes assessed by *the* principle of subsidiarity. I have suggested that such arguments and institutional proposals are too often conflated: there are drastically different conceptions of subsidiarity, with varying normative plausibility and very different institutional implications. These conceptions of subsidiarity differ as to the objectives of the polities, the domain and roles of member units such as states, and the allocation of the authority to apply the principle of subsidiarity. Indeed, considerations of subsidiarity seldom resolve disagreements about the allocation of authority. Rather, its more defensible versions transpose the contentious issues to the question of what should be the objectives of the legal and political order, and who should have the authority to decide this.

This is not to dismiss the value of the traditions of subsidiarity. One benefit of the concept is to help structure arguments concerning the best allocation of authority over particular issue areas. A second benefit is its value in enhancing the stability of (quasi-) federal orders—a perennial challenge.[45] A federal constitution must, on the one hand, provide sufficient

entrenchment against illegitimate majority rule and, on the other hand, secure dynamic development to reflect changing social circumstances and new risks—without risking domination by unaccountable authorities. The central issue is, then, not just who should have the authority to delineate powers between the center and member units—the issue of "competence competence"—but the power to *reallocate* such powers. How might such decisions be made somewhat dynamic, without creating unacceptable risks for minorities? Two of many options, each with risks, are to allow constitutional changes more easily, or to allow judges more "dynamic" interpretations of the texts. The arguments must no doubt include comparative consideration of risks and benefits of each.[46] Placing such powers with judges runs the risk of being ruled not by law but by lawyers; yet *any* allocation of such powers leads to the question of who should guard these guardians. Justifiable conceptions of subsidiarity may help guide and assess the use of such authority, be it by those revising the constitution or by those interpreting it.

NOTES

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