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Volume 10, Number 2, Summer 2015

URI: <https://id.erudit.org/iderudit/1035329ar>

DOI: <https://doi.org/10.7202/1035329ar>

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Publisher(s)

Centre de recherche en éthique (CRÉ)

ISSN

1718-9977 (digital)

[Explore this journal](#)

Cite this article

Follesdal, A. & Muñiz Fraticelli, V. M. (2015). The Principle of Subsidiarity as a Constitutional Principle in the EU and Canada. *Les ateliers de l'éthique / The Ethics Forum*, 10(2), 89–106. <https://doi.org/10.7202/1035329ar>

Article abstract

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THE PRINCIPLE OF SUBSIDIARITY AS A CONSTITUTIONAL PRINCIPLE IN THE EU AND CANADA

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ABSTRACT:

A Principle of Subsidiarity regulates the allocation and/or use of authority within a political order where authority is dispersed between a centre and various sub-units. Section 1 sketches the role of such principle of subsidiarity in the EU, and some of its significance in Canada. Section 2 presents some conceptions of subsidiarity that indicate the range of alternatives. Section 3 considers some areas where such conceptions might add value to constitutional and political deliberations in Canada. Section 4 concludes with some reminders of crucial contested issues not fully resolved by appeals to subsidiarity alone, exemplified by the protection of human rights.

RÉSUMÉ :

Un principe de subsidiarité régleme la répartition et/ou l'usage de l'autorité au sein d'un ordre politique où l'autorité est dispersée entre un centre et des sous-unités variées. La section 1 de cet article montre le rôle d'un tel principe de subsidiarité dans l'Union européenne, et certaines de ses implications au Canada. La section 2 présente des conceptions de la subsidiarité qui indiquent un éventail d'alternatives. La section 3 considère certains domaines où de telles conceptions pourraient ajouter de la valeur aux délibérations constitutionnelles et politiques au Canada. La section 4 conclut en rappelant certains problèmes cruciaux contestés, non entièrement résolus par les seuls appels à la subsidiarité, exemplifiés par la protection des droits humains.

A Principle of Subsidiarity regulates the allocation and/or use of authority within a political order where authority is dispersed between a centre and various sub-units. The principle places the burden of argument on those who seek to centralize such authority. In the EU, the principle has risen to prominence due to inclusion in several treaties. In Canada, arguments reminiscent of ‘subsidiarity’ appear to underpin the Supreme Court of Canada’s ‘provincial inability test’ to interpret the extent of federal jurisdiction under section 91 of the 1867 Constitution Act,¹ and the principle has been expressly invoked on several occasions on different subject matters.²

Such comparisons between political orders with federal elements should only be done with great caution. One main reason for modesty when comparing the EU and Canada is that they exhibit features, strengths, and weaknesses from two different models of federation.³ A ‘coming together’ federation emerges from independent states that agree to pool sovereign powers in certain areas to better achieve certain objectives. In contrast, a ‘holding together’ federation has emerged from a somewhat unified state in order to secure a different objective—namely, the survival of the state by quelling secessionist threats: delegating contentious issues such as language, religious holidays, etc. to the contesting groups rather than insisting on common policies. The EU has several features of ‘coming together’ federations among fully sovereign states, while Canada’s constitutional and legal arrangements *also* result from attempts at ‘holding together’ the various provinces.

This cautionary note notwithstanding, Section 1 sketches the role of a principle of subsidiarity in the EU and some of its significance in Canada. In order to determine the relevance and value of subsidiarity in the Canadian setting, Section 2 presents some conceptions of subsidiarity that indicate the range of alternatives beyond those chosen by the EU. Section 3 considers some areas where such conceptions might add value to constitutional and political deliberations in Canada. Section 4 concludes with some reminders of crucial contested issues not fully resolved by appeals to subsidiarity alone, exemplified by the protection of human rights.

1. SUBSIDIARITY—IN THE EU AND IN CANADA

Several Treaties in the EU include a principle of subsidiarity. In the latest version, the Lisbon Treaty, the Subsidiarity Principle requires that:

in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”⁴

Such claims must be supported by reasons given in public.

A mechanism that further illustrate the workings of this Lisbon Subsidiarity merit mention. The Lisbon Treaty established a new procedure of parliamentary

review of proposed EU legislation (Protocol, Art 8). This procedure gives power to national parliaments to monitor proposals and to appeal them—to give out a “yellow card”—if they think the decision violates subsidiarity.

In Canada, the federal government may

make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The Supreme Court has interpreted this in part as a question of whether the provincial governments are *able* to address the issues of “Peace, Order and good Government.” Call this *Canadian subsidiarity*. Decisions to centralize may turn on whether decisions made by one province impact on other provinces unduly, or whether federal rather than provincial action has comparative advantages, similar to the EU. The presumption is thus that decisions should be taken at the territorially lower level, and the burden of argument falls on those who seek central action. Several crucial issues either are determined in these treaties and constitutions or remain underspecified. To bring out the choices made, as well as the prospects for contestation, it is helpful to consider several partially conflicting theories of subsidiarity.

2. TRADITIONS OF SUBSIDIARITY

Proponents of subsidiarity have often ignored that this principle has several different historical traditions with drastically different implications for resolving conflicts between the centre and the member units—as those that arise regarding human rights. The following explores the implications of three central issues of contestation among theories of subsidiarity: (a) the *immunity* of smaller units, or rather, the obligations of larger units to *assist*; (b) the ambiguity as to the fundamental units—whether they are states or individuals; c) the question of who should have authority to *specify the objectives* and interests to be protected and promoted—and indeed to decide whether the principle of subsidiarity permits or requires more centralized action.

To get a better grasp of the specific features of *Lisbon* subsidiarity and *Canadian* subsidiarity, consider five alternative theories of subsidiarity, each of which has different implications both for authority above the state and for the allocation of authority about who should apply the principle of subsidiarity.⁵

I shall suggest that Lisbon subsidiarity grants undue privileges to the state and its interests, as we see when we compare to the various traditions from which this principle is drawn. On the other hand, Canadian subsidiarity seems restrained in the reasons for centralization consistent with subsidiarity. The five accounts draw on insights from Althusius, the American Confederalists, economic federalism, Catholic personalism, and liberal contractualism, respectively. They are sketched in an order that roughly grants the member units less authority. These accounts may regard subsidiarity as *proscribing* or prescribing central intervention, and

apply subsidiarity to the *allocation* of political powers or to their *exercise*. Some of these features reduce the scope of member unit authority, while some may protect them against intervention. Several of them seek precisely to reduce the need for general agreement among different world views or preference profiles, supporting the ‘holding together’ federal elements found, for example, in Canada.

(A) LIBERTY: ALTHUSIUS

Althusius, the so-called father of federalism, sketched an embryonic theory of subsidiarity drawing on Orthodox Calvinism. Communities are important supports (‘subsidia’) for the needs of individuals. Political authority arises on the basis of covenants among such associations. The role of the resultant centralized state is to co-ordinate and secure symbiosis among these associations on a consensual basis: “explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life” (Althusius, 1995, chap. 28). Althusius recognized that deliberation will not always yield agreement, particularly not in matters of faith. In such cases, he counselled religious toleration: “the magistrate who is not able, without peril to the commonwealth, to change or overcome the discrepancy in religion and creed ought to tolerate the dissenters for the sake of public peace and tranquillity, blinking his eyes and permitting them to exercise unapproved religion” (Althusius, 1995, chap. 28). This interpretation of subsidiarity would appear to take the existing sub-units for granted—a feature it shares with Lisbon subsidiarity. A weakness is thus that this approach fails to identify standards for legitimate associations regarding their treatment of members, their proper scope of activity, and their legal powers. Perhaps appeal might be made at this point to the value of freedom as absence of state constraint—this is indeed part of Althusius’s argument for associations. But the grounds and scope of this paramount interest in non-intervention remain to be identified. The Althusian theory of subsidiarity might allow some conditions on legitimate subunits and on standards for power allocation among subunits, but such restrictions are not readily apparent.

This concern is perhaps most vividly underscored by the fact that the South African practice of *apartheid* and separation into so-called homelands was long regarded as justified precisely by this tradition of subsidiarity, of “sovereignty in one’s social circle” (Kuyper, 1880; de Klerk, 1975, pp. 255-260). The South African model did show the influence of the Dutch pluralist tradition of *pillarization*, a system of social organization (inspired by Kuyper) in which distinct cultural or religious groups in a country control their own separate institutions. This tradition traces its origins to the same sources as Althusian subsidiarity (Baskwell, 2006). But the South African case demonstrated perversities that show some of the limitations of subsidiarity as a principle. But the segregation of the black South African population was not voluntary (as Kuyper would have it). Rather than taking subunits for granted and allocating competencies among them, the apartheid system *created* subunits on the pretense of subsidiary allocation of power. It is of course not clear that the role of subsidiarity should be

to determine the boundaries of units, rather than to be limited to allocating power between pre-existing units. And the homelands, of course, did not support, but rather inhibited the needs of individuals within them, thus perverting the idea of subsidia.

A second characteristic of Althusian subsidiarity is that, on this view, the common good of a political order is limited to such immunities and to those undertakings deemed by *every* subunit to be of their interest compared to their status quo. While this account allows for negotiation among subunit representatives based on existing preferences, agreement on ends is not expected—which is why subsidiarity is required in the first place.

Thirdly, Althusian subsidiarity is strongly committed to immunity of the local unit from interference by more central authorities. This raises severe problems when some subunits—associations or states—lack normative legitimacy, and insofar as interstate inequities raise issues of distributive justice, as in both the EU and in Canada. This point also brings attention to the so-called inability clause of Canadian subsidiarity: what should the central authorities do if one or more provinces are able but unwilling to act so as to secure the requisite objectives?

(B) LIBERTY: CONFEDERALISTS

Similar conclusions emerge from *confederal* arguments for subsidiarity based on the fear of tyranny, known from the US Federalist debates. On this view, individuals should be free to choose in matters where no others are harmed. This is thought to be best secured by decentralized government enjoying, as on the Althusian account, *veto* powers. Thus subunits may veto decisions, or super-majoritarian mechanisms must be established. An added reason for local politics often found in this tradition is that participation—and possibly subsidiarity—might be thought to facilitate learning and to secure political virtue.

Some limitations of this view should be mentioned. Firstly, it seems to assume a conception of the common good only as mutual advantage, leaving the areas of application open. Secondly, the exclusive focus on tyranny as the sole ill to be avoided is questionable. In the historic context of the European Union, similarly, abuse of centralized powers is not the only risk: local abuse, as experienced under Nazism, and the inability to secure necessary common action are also threats to individuals. Thus, as Madison pointed out, the plight of minorities is uncertain, since it is unlikely that smaller units are completely homogeneous. Indeed, tyranny may emerge more easily in small groups. It might also be easier for minorities to muster courage in larger settings.

As Jacob Levy observes, “Madison’s argument here combines insight about the oppressive potential of local homogeneity and local majorities with an unusually strong endorsement of heterogeneity and plurality in political life.” (Levy, 2015, p. 203). It is not in the abolition of national power or the suppression of local

allegiance that oppression is avoided, but in the multiplication of factions that “make[s] it difficult to assemble a national coalition in favor of any particular partial interest.” Madison’s is not an argument for subsidiarity, but it is an argument that recognizes the fruitful tension between local and national power.

This version of subsidiarity with subunits’ veto powers may reduce opportunities and need for agreement. Montesquieu held that common interest is easier to see in a smaller setting. We may note that Scharpf (1988) makes similar arguments for subsidiarity in the European Union. Indeed, this narrow conception of relevant interests may be regarded as a response to such pluralism of world-views and conceptions of the good life. But such a response could surely be enhanced by adding to this some further common interests, such as meeting certain basic needs. Human rights protections might thus also be grounded in this tradition. After all, perfect homogeneity is never achieved, and “the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression” (Madison 1787). These risks should be kept in mind when considering the implications of Lisbon subsidiarity or Canadian subsidiarity for human rights protections.

(C) EFFICIENCY: ECONOMIC FEDERALISM

This theory 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 where targeted provision of public goods is more efficient in economic terms. Member units do not enjoy veto powers, since free-riding member units may be overruled to ensure efficient coordination and production of public goods—namely, non-excludable and inexhaustible goods. One weakness of this view is that it is limited in scope to such public goods. One strength of this account is that it may help specify the comparative advantage sometimes provided by central action, as found in Canadian subsidiarity. However, economic federalism suffers from the standard weaknesses of economic theory regarded as a theory of normative legitimacy, including ignorance of important issues of preference formation. Moreover, it relies on Pareto improvements from given utility levels, ignoring the pervasive impact of unfair starting positions. Also note that arguments of economic federalism may recommend that issues are removed from democratic and political control, and instead be placed with market mechanisms, courts, or other non-political arrangements within subunits.

Of relevance for Lisbon subsidiarity, we may note that this argument *questions* the presumption in favour of member states as the appropriate subunits, and may instead support placing powers with substate regions or even individuals. Subsidiarity, also on this view, may go all the way down.

(D) JUSTICE: CATHOLIC PERSONALISM

The Catholic tradition of subsidiarity is expressed clearly in the 1891 Encyclical *Rerum Novarum*, and further developed in the 1931 Encyclical *Quadragesimo Anno* against fascism. The Catholic Church sought protection against socialism, yet protested capitalist exploitation of the poor. As developed in personalism, the human good is to develop and realize one's potential as made in the image of God. Voluntary interaction is required to find one's role and to promote one's good. The state must serve the common interest, and intervene to further individuals' autonomy.

This version of subsidiarity should regulate both competence allocation and exercise. It allows both territorial and functional applications of the principle, possibly placing some issues outside of the scope of democratic politics. Subunits do not enjoy veto rights, and interpretation of subsidiarity may be entrusted to the centre unit. Non-intervention into smaller units may often be appropriate, both to protect individuals' autonomy—we might think of human rights—as required for their proper development, and to save the scarce resources of the state or other larger unit. Conversely, state intervention is legitimate and required when the public good is threatened, such as when a particular class suffers (paras. 36 and 37; Pius XI 1931, para. 78).

This particular conception of subsidiarity rests on contested conceptions of the social order as willed by God, and of the human good as a particular mode of human flourishing. It is thus easily subject to the reasonable criticism that it cannot be applied among parties who fail to share this contested view. Indeed, the Catholic account of subsidiarity illustrates a broader feature of the principle—namely, that it presumes a significant amount of agreement about the common good (religious or not) and about the structures of adjudication of competencies (ecclesiastical or otherwise). In an organization like the Roman Catholic Church, in which the different components ostensibly share a common end and accept a common hierarchy, the jurisdictional problem of which authority ought to make decisions about competency and on what grounds it ought to make them is already resolved. This jurisdictional problem is prior to the application of the principle of subsidiarity, as we have observed several times above, and this conception of subsidiarity is ill-equipped to solve it (Levy, 2007, p. 459; Muñoz-Fraticelli, 2014, pp. 64-73).

The principle of subsidiarity cannot settle beyond reasonable disagreement which subunits and cleavages should be embedded—e.g., the role of families, or of labour unions. This may be an advantage, in that it makes this theory more flexible and adaptable to various forms of social organization. However, it does create problems when this version has strong yet contested views about what the responsibilities should be—e.g., those of families regarding care for the infirm and wages or support for the unemployed. Deliberation might reduce these disagreements for purposes of reaching public consensus. And one might be able to agree on certain basic human necessities—such as human rights—which are less open to challenge.

As long as there is such disagreement about conceptions of the good life, we should be wary of granting authority to make such decisions about flourishing to *any* authorities—be they decentralized or centralized. However, this is compatible with subunits pooling certain powers to secure objectives they deem in their interest. Furthermore, human rights treaties that limit state sovereignty may be more robust against criticism of this kind: these treaties and international efforts are not clearly aimed at promoting flourishing, but rather largely aimed at preventing abuse of state power that causes human *harms*. There is arguably more—but not full—agreement on such topics than on the details of human flourishing.

Some of these aspects of the Catholic view are consistent with the Lisbon Treaty and with Canadian subsidiarity, in that standards and objectives of the social order are to be taken as given—whether respectively, by God and His Church; by the treaty and its guardian, the Commission or as stated in the Canadian Constitution: “Peace, Order and good Government”. Disagreement about such social functions are not easily managed by means of this conception of subsidiarity. On the other hand, this approach clearly allows challenges concerning the legitimacy of particular member units or states: The state must comply with natural and divine law to serve the common interest (John XXIII 1961, para. 20; Leo XIII 1891). This account also holds that subsidiarity must go all the way down to the individual—a view that sits less well with those conceptions of subsidiarity that only apply to the relationship between a state and interstate relations, as the EU or in Canada.

(E) A LIBERAL CONTRACTUALIST CASE FOR SUBSIDIARITY

Liberal contractualism of the kind associated with Rawls, Scanlon, or Barry might acknowledge a limited role for subsidiarity. Some but not all of the arguments above find support within this tradition. In addition, two arguments consistent with this tradition provide some support for subsidiarity. Firstly, individuals must be acknowledged to have an interest in controlling the social institutions that in turn shape their values, goals, options, and expectations.⁶ Such political influence secures and promotes two important interests. Agreeing with the Republican claim of confederalists, it protects our interest in avoiding domination by others (cf. Pettit, 1997). In modern polities, this risk is arguably reduced by a broad dispersion of procedural control. Control over institutional change further serves to maintain our legitimate expectations. We have an interest in regulating the speed and direction of institutional change. This interest is secured by ensuring our informed participation, to reduce the risk of false expectations. When individuals share circumstances, beliefs, or values, they have a *prima facie* claim to share control over institutional change to prevent subjection and breaking of legitimate expectations. Those similarly affected are more likely to comprehend the need and room for change. *Insofar* as this holds true of members of subunits, there is a case for subsidiarity. Such considerations would, for instance, seem to support various legal powers enjoyed by the Francophone in Quebec. However, this account does not single out member units in the form of states as the only relevant subunits, contrary to Lisbon subsidiarity.

The second argument for subsidiarity concerns its role in character formation. The principle of subsidiarity can foster and structure political argumentation and bargaining in ways beneficial to public deliberation, and to the character formation required to sustain a just political order. By requiring impact statements and arguments of comparative efficiency, and by allowing member unit parliamentarians an institutional role, Lisbon subsidiarity may facilitate the socialization of individuals into the requisite sense of justice and concern for the common good. For this purpose, the principle of subsidiarity need not provide standards for the resolution of issues, as long as it requires public arguments about the legitimate status of member units, the proper common goal, and the likely effects of subunit and centre-unit action. However, this liberal contractualist argument *underdetermines* subsidiarity. That is, *other* rules for the exercise of political power could serve the same purpose, which is to ensure public debate about shared ends and suitable means, leading to preference adjustment. Furthermore, this debate must be supplemented by theories of institutional design in order to suggest suitable institutional reforms. Whether member units should enjoy veto, votes, or only voice is a matter of the likely institutional effects on character formation, and on the likely distributive effects.

SUMMARY: SUBSIDIARITY—IN THE LISBON TREATY, IN CANADA, AND OTHERWISE

In light of these brief sketches, we may conclude that Lisbon subsidiarity and Canadian subsidiarity seem to be conceptions of subsidiarity with features that fit with each of these five theories to varying degrees. The five accounts of subsidiarity sketched above suggest several reasons to support subsidiarity—but quite different versions of it.

(a) Member units are better able to secure shared interests, particularly if shared geography, resources, culture, or other features make for similar interests and policy choices among members of the subunits.

(b) A reduction of issues on the agenda and parties to agreements serve to reduce the risk of information overload, and foster joint gains.

(c) The deliberation fostered by subsidiarity can help build community, partly by preference formation towards the common good. The deliberation about ends also supports an important sense of community for a minority, that these decisions are ours, and can foster a sense among the majority about majority constraints. Deliberation may thus enforce the boundary within which majoritarianism is accepted as a legitimate decision procedure (cf. Miller, 1995, p. 257; Manin, 1987, p. 352).

(d) Subsidiarity helps protect against subjection and domination by others, by proscribing intervention into local affairs except when necessary for certain goals that are in some intriguing sense shared.

3. HOW MIGHT TRADITIONS OF SUBSIDIARITY ADD VALUE TO CONSTITUTIONAL AND POLITICAL DELIBERATIONS IN CANADA?

Tolstoy claimed that while all happy families are alike, the unhappy families are all different (Tolstoy, 2011). Similarly, each political order with federal elements is a response to unique situations—often to challenges, but also to special opportunities. Thus the arrangements of the European Union and Canada are different, and lessons may be difficult to draw between them. For instance, insights concerning risks of fragmentation and centralization may not travel well. The risks are different depending on the constitutional design: the best mechanisms are different, since they must reflect history. For instance, are these political orders the result of independent states ‘coming together’—as in the EU—or are these prominent features the result, as in Canada, of attempts to accommodate differences by constitutionally devolving to quell local unrest by reducing the number of issues that all must agree on?

These differences notwithstanding, traditions of subsidiarity may contribute to more legitimate and more stable legal orders.

As most federations, the EU and Canada share one challenge: political orders with federal elements are less stable than unitary states; they have a permanent risk of undue centralization of power, or of fragmentation (Norman, 2001). Canada faces such concerns most saliently with regard to the status of Quebec. The Canadian constitution reduces the risk of untoward centralization or secession by careful listing the powers of both federal and provincial government bodies (in sections 91 and 92). However, issues of national concern may warrant federal action, which may lead to centralization over time. Similarly, the EU must address the emergence of eurosceptics, whose agendas may diverge but may well lead to calls for secession or for at least a removal of certain competences from the EU back to member states.

A principle of subsidiarity—however defined—may serve as a constitutional stabilizing device for such profound disagreements. It may be used as a mechanism to help keep federal arrangements responsive to new challenges, yet maintain federal elements over time. One may hope that it can foster dynamic stability, allowing reasoned change in allocation of competences, avoiding the perennial risks to federations of *undue* centralization or fragmentation in the form of secession. Appeals to subsidiarity may help structure such ‘constitutional’ debates, and the critique and assessment of allocation of competences.

A related reason to value appeals to subsidiarity is that they may help in the critical and constructive assessment of calls for central action. Before turning to the Canadian case, recall that the Lisbon Treaty lays out the following account of subsidiarity:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the

objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but *can* rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.⁷

When interpreted strictly, the likelihood of success of union action is irrelevant for deciding whether union action is permitted: that is only a matter of whether the objectives (a) *cannot* be achieved to a sufficient level by member states, and whether these objectives (b) *can* be so achieved by the EU. A charitable interpretation is that some plausible assessment of *likely success* by EU actors is also required. Consider one example: different member states may give different priority to various objectives. Thus in the EU, some states may be more concerned with environment than with other issues. There may then be disagreement about which level of regulation to aim for. Indeed, there may be cases where an agreed EU level may result in lower standards in some states—and hence overall worse outcomes—than no common standard at all.

In the case of Canadian subsidiarity, the relevant clause is part of section 91 of the Constitution Act of 1867.

It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.

This and the next section enumerate the powers of federal and provincial governments, respectively. Thus, the provinces have exclusive power, for instance, to raise revenues through taxation for provincial purposes, to manage natural resources, to establish institutions for education and medical care, to charter corporations “for provincial objects,” and to secure property and civil rights in the province (Sec. 92). In relation to agriculture or immigration, federal and provincial powers are concurrent (Sec. 95). The clause cited above concerns how residual powers should be allocated and used. While the Constitution allows the federal government to exercise authority in all areas not reserved to the provinces, this has been understood as legitimizing central action only in certain cases.

Generally, we see similarities to subsidiarity in Canada when the Supreme Court attempts to determine the applicability and limits of the federal power to promote “Peace, Order, and Good Government.” The Supreme Court of Canada has focused on a doctrine of national concern test for promoting certain specified objectives. In order to determine whether a matter fell under the federal government’s jurisdiction, the Court asked whether the provinces were unable to address the problem under consideration. In *R. v. Crown Zellerbach Canada*, the Court outlined the elements of the “national concern doctrine.”

For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution[.]⁸

Pollution of waterways that cut across provinces is a typical example of such externalities wrought on other provinces. Another justification for federal action is when federal rather than provincial action has comparative advantages. Considerations of subsidiarity may foster systematic discussions about how to specify these reasons, and possibly add other reasons based on subsidiarity that may counsel central action consistent with the constitution. Central action is only permitted in cases where these objectives are at stake, or because decisions by one province impacts on other provinces to a sufficiently large extent. This is the basis of the provincial inability test of matters of national concern.

However, the effect of the Court's reliance of a test of provincial inability to curb excessive centralization (as one might expect of a principle analogous to subsidiarity) is at best equivocal, both before and after the Zellerbach decision.⁹ Eugénie Brouillet observes that

since the 1988 [Zellerbach] decision, this doctrine, although frequently invoked by the federal government in support of its legislative interventions, has been less frequently used by the Supreme Court, which prefers to validate its actions on the basis of the listed areas of jurisdiction, even if it has to extend their scope. (Brouillet, 2011, p. 622, n. 83)

The effect of the national concern doctrine and its provincial inability test has been, unsurprisingly, to justify further centralization of authority at the federal level. Brouillet is quick to note the difference between the notion of provincial inability and the principle of subsidiarity in the European Union. First, while “the European principle, ... only produces its effects in a situation of concurrent jurisdiction, the Canadian notion can apply with regard to matters that are not under the jurisdiction of the federal parliament at all.” (Brouillet, 2011, p. 621) It therefore bypasses the jurisdictional limits characteristic of federations and works to draw authority ever upwards, rather than towards the federal state or the provinces, depending on circumstances.

Other doctrines developed by the Supreme Court of Canada to allocate competencies between the federal and provincial level share features of subsidiarity, especially the federal power to regulate general trade and commerce.¹⁰ Their application has likewise had a centralizing effect. In the opposite direction, Canadian courts have developed a doctrine of ‘double aspect’ when provincial and federal legislatures may simultaneously legislate on the same subject matter. The Supreme Court has not been clear on the principles to apply in such cases, although, Hogg suggests, it has cautioned judicial restraint (Hogg, 2015).

The discussion above prompts several questions. Who has the authority to determine the requisite “Order and Good Government,” and is this allocation wise for purposes of avoiding centralization? Is this for the provinces to decide, possibly yielding profound disagreement and thus inaction? Or is it for the federal government, at the risk of imposing one contested conception of these concerns against others? Likewise, who has and should have authority to decide what counts as externalities—that is, costs borne by other provinces? What counts as such costs is in part determined by which objectives are recognized as legitimate. Consider a hypothetical case where one province creates an interprovincial competition by means of more attractive regulations. Lower tax rates or laxer protection of workers entice businesses to establish themselves there, but this results in lower redistributive services to the distraught. Other provinces or their citizens may charge that this competition induces a race to the bottom. For them this is a negative externality, but the province that lowers its tax rate may disagree insofar as it rejects redistribution as an objective.

With regard to the comparative advantage of central action, the overview of theories of subsidiarity reminds us that economies of scale may counsel centralization in some cases—while local clusters of policy preferences may do the reverse. However, it will often be contested whether the provinces or the federal level has comparative advantage in securing the requisite goals, not least with regard to cost effectiveness. One example from the EU may be environmental protection, which may be secured to a higher degree in some member states such as Germany, than in an EU-wide regulation. Again, a central issue is who has the authority to decide whether central action is better—and whether member units should have veto power.

These issues that come into focus when we explore alternative theories of subsidiarity are grounds to consider central action other than in terms of inability and comparative advantage. In particular, important questions arise when one member unit fails to promote certain objectives not out of inability, but out of unwillingness. In principle, human rights violations may be of such kind. Depending on one’s choice of conception of subsidiarity, such a member unit should be able to enjoy immunity, or to veto common action—or find itself defeated by a majority in the federal government.

4. LIMITS TO THE VALUE OF A PRINCIPLE OF SUBSIDIARITY: NOT A PANACEA.

The benefits of attending to subsidiarity arguments should not be overdrawn, for several crucial contested issues are not resolved by a generally acceptable principle. One such issue involves the consideration of human rights concerns when attempting to justify and structure the political order itself. These foundational questions demonstrate the limits of the principle of subsidiarity, and suggest either that human rights concerns may need to be directly specified by other principles, or that subsidiarity itself must be interpreted as going ‘all the way down’ to the individual, either in the sense that it is justified only insofar as

it serves individuals' interests, or because it recognizes individuals as the ultimate arbiters of these interests.

'The' Principle of Subsidiarity cannot on its own provide legitimacy or contribute to a defensible structuring of a political order with federal elements, or of human rights law. As indicated above, appeals to subsidiarity are too vague, and require attention to several items—including who should decide the objectives of central action, and whether central action is prohibited or required. We submit that more plausible versions of subsidiarity insist that, ultimately, these questions are answered in light of the arrangements that benefit individual persons' interests better than the alternatives. Neither subsidiarity nor sovereign states are obvious solutions.

With regard to the risks of undue centralization that federations face, we should also recall that appeals to subsidiarity *may* be used to defend more central action. Subsidiarity may promote centralization unduly if the central authorities can determine objectives contrary to the preferences of member units and override their protests. Some critics of subsidiarity in the European context have argued precisely that "instead of providing a method to balance between Member State and Community interests, [subsidiarity] assumes the Community goals, privileges their achievement absolutely, and simply asks who should be the one to do the implementing work." (Davies, 2006, p. 67)

Finally, consider more fully the problems for conceptions of subsidiarity that arise in a multilevel setting with regard to human rights protection. Subsidiarity considerations do not automatically protect individuals from 'local' domination, incompetence, or tyranny—unless that is specified as an objective of the federal order, e.g., as a commitment to protect human rights. This is one reason why many hold that a principle of subsidiarity must be supplemented with human rights protection against the subunit authorities. But such a supplement does not sit well with all of the conceptions of subsidiarity that stress the autonomy of member units. In 'coming together' federations, treaties typically agreed to favour the interests of states, without due regard to the impact on individuals within or without their borders. This is not to deny that treaties may well benefit individuals, insofar as a sufficient number of these states happen to be democratic or otherwise responsive to the interests of their citizens. But arrangements that benefit individuals to the disadvantage of states can thus not be expected, and such arrangements are not likely to give the interests of individuals sufficient weight against other interests of states or of their governments. In the EU, this weakness is avoided by insisting that all member states are subject to the European Convention on Human Rights, and by various human rights conditions included in the EU treaties.

For 'holding together' federations, there is similarly no mechanism that ensures that the member units' autonomy is constrained by human rights protections maintained by the central authorities. In the Canadian setting, such tensions are addressed quite clearly, not least with the 1982 Canadian Charter on Rights and

Freedoms (Part 1). Thus, central authorities may seek to protect also good governance within member units. Some tensions remain, as in connection with conflicts between the rights of minority cultures and egalitarian citizenship rights, leading some to ask whether multiculturalism is good for women (Cohen, 1999).

In both these kinds of (quasi)federations, central courts may provide helpful services in protecting individuals from abuse by their member unit authorities. Important contested issues remain, especially in states that have long traditions of largely sufficient domestic human rights protection. They may ask, as the UK and other states in Europe now do, sometimes with appeals to subsidiarity: by what right should centralized courts with mixed credentials be permitted to override domestic legislation as incompatible with human rights standards? Again, the normatively best response may require attention to details such as what power such a central court should have—to overturn legislation or only to urge national legislatures to reconsider—and whether such courts should be more lenient toward member units that are generally more compliant with human rights. Some such suggestions will again be favoured by considerations of subsidiarity—but only if subsidiarity goes all the way down to the individual. That is, subsidiarity may be compatible with, and indeed supportive of, multi-level human rights protections including judicial review. But the justifiable principles of subsidiarity must insist that the ultimate standard of justification of the allocation of political authority is not whether it serves the interests of member units, but whether such a legal and political order serves the best interests of individuals.

ACKNOWLEDGMENT

A precursor of this chapter was presented at a conference on Federalism, EU and Canadian Perspectives hosted at Charles University, Prague, May 6, 2011. Andreas Follesdal is grateful to the organizers for that opportunity and to participants and Birgit Schlutter for constructive and charitable comments. This article is written under the auspices of ERC Advanced Grant 269841 MultiRights.net —on the Legitimacy of Multi-Level Human Rights Judiciary, and partly supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274—PluriCourts.net—The Legitimacy of the International Judiciary. Victor Muñoz-Fraticelli would like to thank Arielle Corobow for valuable research assistance and the Social Sciences and Humanities Research Council’s Insight Development Grant for financial support.

NOTES

- ¹ See *R. v. Crown Zellerbach Canada*, [1988] 1 S.C.R. 401 and *General Motors Canada v. City National Leasing*, [1989] 1 S.C.R. 641. We owe much of the Canadian discussion to Hogg, 1993.
- ² E.g., 114957 *Canada v. Hudson* [2001] 2 S.C.R. 241, par. 3 [whether municipal legislation allowed a municipality to pass a bylaw restricting pesticide use]; *Canada Western Bank v. Alta.* [2007] 2 S.C.R. 3 para. 45 [whether inter-jurisdictional immunity, by limiting provincial but not federal powers, undermines the principles (sic) of subsidiarity]; *Re Assisted Human Reproduction Act* [2010] 3 S.C.R. 457 [whether parliament had authority under criminal law power to regulate assisted human reproduction]; discussed in Brouillet, 2011.
- ³ For the origins of the typology, see Stepan, 1999.
- ⁴ European Council, “Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, 13 December 2007,” *Official Journal of the European Union*, vol. 50, no. 2007/C 306/01, 2007, Art 5.3.
- ⁵ A fuller explanation of these traditions of subsidiarity is given in Follesdal, 1998.
- ⁶ On a more local level, we may also consider Rawls’s insistence that “the principles of justice are related to human sociability” and that the social bases of self respect (the most important of the primary goods) develop especially in social unions, settings in which “shared final ends and common activities valued for themselves” are collectively pursued by like-minded individuals within a larger social setting. Rawls, 1999, pp. 460-462.
- ⁷ European Council, “Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, 13 December 2007,” *op. cit.* (our emphasis).
- ⁸ *R. v. Crown Zellerbach Canada*, [1988] 1 S.C.R. 401, par. 33.
- ⁹ A clear early example is the creation and regulation of federally chartered corporations. Under the Constitution Act of 1867, provinces have power over the “incorporation of Companies with Provincial Objects” (Sec. 92(11)). No such power is granted to the federal government, except for the incorporation of banks. Yet in *Citizens’ and The Queen Insurance Cos. v. Parsons*, 1881, 7 App. Cas. 96 (P.C.), the Privy Council—which was then the final court of appeal in Canada—found the power to incorporate companies at the national level to be implicit in the Peace, Order, and good Government clause. Inversely, in *Bonanza Creek Gold Mining Co. Ltd. v. R.* [1916] 1 A.C. 566 (P.C) the Privy Council interpreted this clause narrowly to say that “[a] province is not capable of endowing a corporation the capacity to carry on business in other jurisdictions, but will be able to do so only if it obtains the permission from the other jurisdiction.” Provinces may still regulate federal corporations (as when they regulate business generally), but only if this regulation does not “affect some essential aspect of a federal corporation.” See VanDuzer, 2003, p. 86ff.
- ¹⁰ See *General Motors of Canada v. City National Leasing*, [1989] S.C.J. No. 28, [1989].

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