Abstract

This paper explores Subsidiarity – somewhat unconventionally - as a constitutional principle in international human rights law (Carozza 2003). The principle of subsidiarity regulates the placement and/or use of authority within a political or legal order, and holds that the burden of argument lies with attempts to centralize authority (Follesdal 1998). Such a Principle of Subsidiarity is explicit in EU law at least since the Maastricht Treaty, as well as in many federal states. Some have appealed to subsidiarity in order to defend the legitimacy of several striking features of international law, such as the centrality of state consent, considerable leeway when determining states’ compliance, and weak sanctions in the remaining cases of non-compliance. Subsidiarity is seen as a way to protect national sovereignty whilst securing sufficient problem-solving.

With regard to the human rights supervisory organs, a central philosophical question is whether they are at all compatible with subsidiarity: Why, if at all, should such treaty organs exist with the powers they have over domestic legislators, executives and judiciaries? What are the problems, for which such treaties appear to be plausible steps toward a solution? A central objective of the paper is to use answers to this question to explore the best account of subsidiarity for international human rights review.

Different interpretations of subsidiarity have strikingly different institutional implications regarding the objectives of the polity, the domain and role of subunits, and the allocation of authority to apply the principle of subsidiarity itself – five different interpretations are explored, drawn from as different sources as Althusius, the US Federalists, Pope Leo X, and the European Commission (Follesdal, 1998). The choice among them has drastic implications for the appropriate authority of international institutions vs domestic authorities – and thus for what sorts of institutional or constitutional reconfiguration should be pursued.

One upshot is that the Principle of Subsidiarity cannot provide legitimacy on its own: Rather, it stands in need of substantial interpretation, which must be guided by normative considerations. While it may prove a helpful ‘constitutional principle’ for international human rights law and other public international law, many crucial aspects require much further attention, including the standing of states.

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“Subsidiarity” has emerged as a prominent concept in legal and political theory, not least due to its inclusion in the 1991 Maastricht Treaty on European Union. A “principle of subsidiarity” regulates the allocation or use of authority within a political order, typically those where authority is dispersed between a centre and various sub-units – e.g. in a federation (Follesdal 1998). The principle places the burden of argument on those who seek to centralize such authority. Thus the Principle of Subsidiarity of the Lisbon Treaty holds that in certain issue areas, the sub-units should decide unless central action will ensure higher comparative efficiency or effectiveness in achieving the specified objectives.

A principle of subsidiarity is sometimes hailed as a promising ‘structuring principle’ for international law; be it for human rights law in particular (Carozza 2003, 38); to determine the limits of sovereignty (Kumm 2009, 294), for EU law (De Burca 1999), or possibly for international law more generally (Slaughter 2000). Proponents seldom urge a Principle of Subsidiarity as a panacea suited to resolve all conflicts. Instead - as one of several examples - the Interlaken Declaration on the Reform of the European Court of Human Rights (ECtHR) emphasized the principle of Subsidiarity as a crucial element of reform (Interlaken Conference on the Future of the European Court of Human Rights 2010). A principle of subsidiarity may serve at least two helpful related functions. Firstly, as a way to structure legal and political debates engaging both normative and empirical premises on such issues of allocation of authority (Kumm 2009, 295). The value of such structuring rests on the second function, whereby a principle of subsidiarity is thought to provide normative legitimacy to contested aspects of international law. In this role as a ‘Constitutional Principle’ subsidiarity is used to justify certain features of public international law that protect national sovereignty. These features include: An understanding of the social function of public international law as supplementing domestic law; the centrality of state consent; the common requirement that local remedies must be exhausted; the practice of granting states a ‘Margin of Appreciation’; and the alleged weak or nonexistent treaty sanctions.

The present article addresses and challenges this latter justificatory role of a principle of subsidiarity, to deny that defensible conceptions of subsidiarity do indeed support these features of public international law as currently observed. While subsidiarity considerations are often sound, a defensible principle of subsidiarity seldom resolves but only transposes such conflicts about the legitimate scope of sovereignty and optimal allocation of authority. Indeed, considerations of subsidiarity forces attention to more items than are sometimes noted. To bring out these general points, I focus on some salient aspects of the role of human rights and the particular version of subsidiarity stated in the EU’s Lisbon Treaty. Human rights treaties present quite different challenges to sovereignty than treaties aimed to resolve collective action problems or ensure coordination. I shall suggest that “Lisbon Subsidiarity” as I shall refer to it, has some peculiar features with important repercussions for how human rights are protected.
One reason for the many calls to use subsidiarity considerations to assess human rights law in particular may be that both human rights and subsidiarity has as one normative premise assumptions about the dignity of humans understood as individuals situated in several webs of relationships – families, associations, states – within a global order. But proponents of subsidiarity have tended to ignore that this principle has several different historical traditions with drastically different implications for resolving such conflicts as those between sovereignty and human rights. The following explores the implications of three central issues of contestation among theories of subsidiarity: a) the stress on immunity for smaller units, or to stress obligations of larger units to assist as they see fit. b) what are the fundamental units? States – or individuals? – or international organizations? c) who should have authority to specify the objectives and interests to be protected and promoted – and whether more centralised action is required?

That this multiplicity of traditions is overlooked is not new – indeed, this ignorance may have been part of the reason why so many endorsed the principle in the Maastrict Treaty as a way to curb undue centralization. The disagreement should not give rise to too much dispair, since some of the traditions do not seem defensible given our circumstances of pluralism concerning views of the good life. But the discussions must be guided by such disagreements also, in ways that are not yet fully acknowledged. Among the claims elaborated in this paper is the versions of subsidiarity appealed to by several proponents suffer from some weaknesses due to the centrality that states enjoy. The features and flaws of this State Centric conception of a principle of subsidiarity – State Centric Subsidiarity for short – are laid out below. The EU avoids some of these problems by how the Lisbon Treaty expresses and embeds its Principle of Subsidiarity, while other problems remain. They include concerns about how to apply the Principle of Subsidiarity to mixed objectives, as arguably the European human rights regimes.

Section 1 sketches the present role of subsidiarity and human rights in the EU, in the forms presented in the Lisbon Treaty. This brings out well some of the central assumptions and modes of thought underlying subsidiarity in general. Some though not all of these points may also be transposed to other areas of international law – and to other versions of subsidiarity. Section 2 presents five different theories of subsidiarity, stressing relevant differences. Section 3 draws some implications with regard to the contributions a principle of subsidiarity offers to justify aspects of international law. Section 4 discusses the compatibility of plausible principles of subsidiarity and human rights law in particular. [To be expanded in light of our discussions in Frankfurt!]

1 Subsidiarity and Human Rights in the Lisbon Treaty
The Lisbon Treaty (LT) entered into force in 2009, as a modified version of what became known as the ‘Constitution for Europe’ drafted in 2002-03 by a Constitutional
Convention. The LT enhances human rights – in a spirit of subsidiarity - in several ways.

At least five aspects of the LT underscore the *prima facie* preference for state over EU authority, said to express subsidiarity. All five points illustrate why subsidiarity was introduced into the EU treaties in the first place, starting with the Maastricht Treaty: to protect state interests and limit intervention by the centre. Member states sought to defend against unwarranted centralisation and domination by Union authorities.

Firstly, as all treaties go, the LT requires explicit consent by every EU member state. The competences and objectives of the EU are thus said to be identified, specified, and delegated by member states. Each state has determined that it is in their interest, broadly conceived, to pool some authority in order to better pursue certain joint actions.

Secondly, the treaty states that certain EU competences, in those issue areas where the states and the EU share authority, are to be exercised respectful of a principle of subsidiarity. These points are both stated in Art 5.1:

The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

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 (art 5.3)

A third example of subsidiarity in the LT - ‘Lisbon Subsidiarity’ – is stated thus: 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 (art 5.3)

A third example of subsidiarity in the LT is the ‘Yellow Card Procedure’: an innovative arrangement that allows national parliamentary review of proposed EU legislation (Protocol, Art 8). National parliaments monitor proposed EU decisions and may appeal those thought to violate Lisbon Subsidiarity (Cooper 2006). This addresses the tensions and risks of undue centralisation when member units disagree with each other or with the central authorities whether joint action is required and efficacious, and when they disagree about how to weigh the different objectives. The ‘Yellow Card’ procedure addresses precisely this competence, and increases the role of member states. However, one may worry that this procedure offers insufficient protection against ‘competence creep’ toward the centre, since the procedure only applies to certain kinds of legislation, and the national parliaments can only appeal to the legislative institutions, and not even to the European Court of Justice. So Lisbon Subsidiarity can help prevent undue central domination, albeit not provide a completely comprehensive guard. Some more protection is offered by a fourth case of subsidiarity, namely the LT’s inclusion of a *Charter on Fundamental Rights*. (LT Art 6). A principle of subsidiarity does not guarantee against domination or abuse of power, be it from central or more local authorities. In the EU, subsidiarity is supplemented by human rights norms that regulate the central authorities.
According to LT Article 6, further specified in Protocol 8, the EU shall accede to the ECHR and thus become subject to its Court (ECtHR), as are all member states already. The added layer of human rights norms of the ECHR makes human rights even more visible, and may add to the protections of individuals. LT Article 6 also makes clear that the Union recognizes the rights, freedoms and principles of the Charter on Fundamental Rights, and that the Charter shall have the same legal value as the treaties. This Charter explicitly endorses a principle of subsidiarity. Its Preamble “reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity,” and Article 51 holds that the Charter is “addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity.”

What are the implications of such ‘due regard’ for subsidiarity? The Treaty states that the EU must act and legislate consistently with the Charter, and EU courts will rule out EU legislation which is incompatible with it. The Charter also applies to the member states, but Article 6 explicitly states that the Charter shall not extend the competences of the Union. Again, this can be seen as an expression of subsidiarity, in that EU courts will react only insofar as member states implement EU law, not regarding the states’ other legislation and policies.

The fifth example of how the LT respects subsidiarity concerns modifications to the EU’s monitoring system for suspected human rights violations within Member States (LT Article 7). The changes reflect recommendations on the basis of the 2000 ‘reactions against Austria’ – reactions by several EU member states who suspected that the government of that country was xenophobic. Monitoring arrangements have been in place since the 1997 Amsterdam Treaty (Art. F.1), but the LT develops them further. The Council may seek to determine whether there is a ‘clear risk of a serious breach’ by a Member State of the values of Article 2, including human rights. The new procedure requires dialogue with the suspected Member State – a requirement absent from the reactions against Austria. The Council may also make recommendations to that Member State. Furthermore, the range of reactions is limited. In particular, there is no procedure to exclude a Member State from the EU, even as a last resort. If the European Council finds that there is a serious and persistent breach, the Council may only suspend some of the rights of the Member State in question, including the voting rights of that Member State in the Council.

Dialogue and recommendations are expressions of the same values supporting a principle of subsidiarity, in that state sovereignty is respected as much as possible.

These five features of subsidiarity in the LT illustrate different ways to regulate the allocation and use of authority. They all underscore how the member states maintain their own authority and seek to limit the risks of domination by the central, international authorities. What are we to make of these ‘state centric’ aspects of Lisbon Subsidiarity – aspects that also permeate principles of subsidiarity that address international institutions? In order to address these questions it is helpful to contrast Lisbon Subsidiarity with other principles of subsidiarity.
Traditions of Subsidiarity

There are several versions of subsidiarity that 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 allocate the authority to apply the principle of subsidiarity differently. The upshot is that the choice of interpretation has drastic implications for the preferred institutional or constitutional configuration for more legitimate global governance, including the appropriate authority of international institutions vis-à-vis domestic courts.

Consider that one of those who urge the Principle of Subsidiarity as a guide for international human rights law, Carozza, does so because he holds that subsidiarity takes the freedom necessary to human dignity and extends it to a regard for freedom at all levels of social organization. This freedom, however, is not simply a negative notion of restraint from interference; it also encompasses an affirmative dimension. It means freedom to act in such a way as to participate fully in the goods of an authentically human life (Carozza 2003, 43)

This is indeed an attractive conception of subsidiarity, in part because it exposes several alternative conceptions and challenges. To mention some central variations: does the conception of subsidiarity stress on immunity for smaller units, or stress obligations of larger units to assist as they see fit...? b) what are the fundamental units of normative concern? States – or individuals? c) who should have authority to specify the objectives and interests to be protected and promoted – and to determine whether more centralised action is required? That is: “authentic” by whose light?

To get a better grasp of the specific features of Lisbon 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.

I shall suggest that Lisbon Subsidiarity grants undue privileges to states and their interests traditionally conceived. This is apparent when we consider the weaknesses of the various traditions from which this principle is drawn. Lisbon Subsidiarity shares some – but not all – weaknesses of what we may call ‘State Centric Subsidiarity.’ State centric subsidiarity has several normative problems which also seem to carry over to its alleged justification for present public international law.

The five accounts draw on insights from Althusius, the American Confederatists, Economic Federalism, Catholic Personalism, and Liberal Contractualism, respectively (Follesdal 1998). They are briefly sketched in the order that roughly grants the states 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.
a Liberty: Althusius

Althusius, "the father of federalism", developed an embryonic theory of subsidiarity drawing on Orthodox Calvinism. Communities and associations are instrumentally and intrinsically important for supporting ("subsidia") the needs of the holy lives of individuals. Political authority arises on the basis of covenants among associations. The role of the state is to co-ordinate and secure symbiosis among associations on a consensual basis. The notion of symbiosis may be interpreted as requiring deliberation about common ends among sub-units, since it involves "explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life" (Althusius 1614, ch. 28). At the same time, Althusius recognised that deliberation will not always yield agreement, particularly not in matters of faith. In such cases, he counselled religious toleration – that is: immunity for the sub-units (Althusius 1614, ch. 28). Some features that are important for our purposes are: This interpretation of subsidiarity appears to take the existing sub-units for granted - a feature it partly shares with Lisbon Subsidiarity. Indeed, 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 constraints by the centre on the member units – this is indeed part of Althusius’ argument for associations. But the grounds and scope of this paramount interest in non-intervention remain to be identified. Lisbon Subsidiarity, on the other hand, is more limited in scope of application, since it only regulates member states who have ratified the European Convention on Human Rights.

Secondly, on this view the common good of a political order is limited to such immunities and to those undertakings deemed by every sub-unit to be of their interest compared to their status quo. While this account allows for negotiation among sub-unit representatives based on existing preferences, agreement on ends is not expected - which is why subsidiarity is required in the first place. Althusian subsidiarity is also strongly committed to immunity of the local unit from interference by more central authorities.

This account of the common good apparently offers no constraints on the impact of differential organizational resources or bargaining positions; and coercive redistributive arrangements among individuals or associations are deemed illegitimate. This raises severe problems when some sub-units – associations or states – lack normative legitimacy, and insofar as inter-state inequities raise issues of distributive justice.

The Althusian theory of subsidiarity might generate some scope conditions on the nature of sub-units to be recognized, and on standards for power allocation among sub-units, 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 “homelands” was long regarded as justified precisely
by this tradition of subsidiarity, of “sovereignty in one's social circle” (Kuyper 1880; de Klerk 1975, 255-60).

b 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. Montesquieu held that common interest is easier to see in a smaller setting. Scharpf (1988) makes similar arguments for subsidiarity in the European Union. This may be thought to be best secured by decentralised government, with the subunits enjoying, as on the Althusian account, veto powers. Thus sub-units may veto decisions, or decide by qualified majoritarian votes. A further implication of this kind of subsidiarity might be illustrated by Montesquieu's suggestion, that once agreement was secured by homogeneity in sub-units, this should be combined with a limited central agenda. For instance, an agreement on the common end of defence should move on to a discussion of the best means of defence, rather than a more expansive discussion of other common ends (Beer 1993, 230). In effect this argument supports a proscriptive version of subsidiarity. It is similar to the Lisbon conception of subsidiarity in that the objectives of cooperation are laid down in advance. – thus this account would presumably be sceptical of ‘dynamic interpretations’ of human rights treaties and other modes of cooperation.

Three relevant drawbacks of this view merit mention. Firstly, the best justification of this conception appears to be limited with regard to its conception of the common good: only as mutual advantage among the units. But presumably, some units may require more support in order to protect and promote the interests of their individual members.

Secondly, the exclusive focus on tyranny as the sole ill to be avoided is questionable. Such a minimalist conceptions of relevant interests may be regarded as responses to the bewildering pluralism of worldviews and conceptions of the good life. Agreement may be easier to reach in small democracies with homogeneity of socio-economic circumstances and closed borders, where politicians are less likely to pursue own advantage, and where demands are stable over time. However, these conditions are unlikely - as the American Federalist debate made clear. Perfect homogeneity is never achieved. But this version of subsidiarity with sub-units’ veto powers may reduce opportunities for agreement – but also reduce the need for such. By limiting the relevant set of interests, confederalism might be thought to avoid such contestation. But surely, such a conception of liberty as immunity is as contested as other interests, and this response could surely be enhanced by adding further common interests of individuals, such as in meeting certain basic needs.

Thirdly, as Madison pointed out, and in particular, 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 while it may be easier for minorities to muster courage in larger settings (Sanders 1997). In the context of the European Union, similarly, abuse of centralised powers is not the only risk: local
abuse – eg of minorities by their domestic government – has been a significant threat. The lack of such protections is surely also an important problem individuals may want addressed. Human rights protections might thus be well grounded.

The upshot is that such state centric subsidiarity entails high risks for individuals, because member states’ enjoying immunity and close to veto power. These problems should be kept in mind when considering both the implications of Lisbon Subsidiarity, and for other state centric conceptions of subsidiarity as a structuring principle for international law as a whole.

c Efficiency: Economic Federalism

The third conception of subsidiarity holds that powers and burdens of public goods should be placed with the populations that benefit from them. Decentralised government is to be preferred insofar as a) local decisions prevent overload, or b) targeted provision of public goods – i.e. ‘club goods’ - is more efficient in economic terms. This conception of subsidiarity seems to match some of the reasons that ‘Euro-sceptics’ are wary of European cooperation.

This theory has broader ambitions than the two presented above, in that it not only is concerned with competence allocation, but also aspires to provide standards for sub-unit identification. Sub-units do not enjoy veto powers: for instance, free-riding sub-units may be overruled to ensure efficient co-ordination and production of public goods – i.e. those that are non-excludable and inexhaustible goods. One weakness of this view is that it is limited in scope to such public goods – leaving to the side issues of how to allocate responsibilities for transfers and social justice among individuals and across units. Economic federalism also suffers from the standard weaknesses of economic theory regarded as a theory of normative legitimacy, in that it does not address the important issue of preference formation, and 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 to remove issues from democratic and political control, and left to market mechanisms or other non-political arrangements within or among sub-units. Such arguments have been used in defense of the ‘democratic deficit’ of the EU (Moravcsik 2002, Majone 1998, Follesdal and Hix 2006).

Finally, of relevance for Lisbon Subsidiarity, we may note that this argument questions the presumption in favour of Member States as the appropriate sub-units. Indeed, this conception may support placing powers with sub-state regions-subsidarity should go “all the way down”.

d Justice: Catholic Personalism

The Catholic tradition of subsidiarity is expressed clearly in the 1891 Encyclica Rerum Novarum, and further developed in the 1931 Encyclica Quadragesimo Anno against fascism. The Catholic Church sought protection against socialism, yet protested capitalist exploitation of the poor. As developed in Personalism, a tradition which inter alia influenced Delors, the human good is to develop and realise one’s potential
as made in the image of God. Voluntary interaction is required to find one’s role and promote one’s good. A hierarchy of associations allow persons to develop skills and talents, and assist those in need. The state must serve the common interest, and intervene to further individuals’ autonomy.

On this account, subsidiarity should regulate both the allocation of legal authority and its exercise. It allows both territorial and functional applications of the principle, possibly placing issues outside of the scope of democratic politics – e.g. regarding religious affairs. Sub-units do not enjoy veto rights. Indeed, interpretation of subsidiarity may sometimes be best entrusted to the centre unit. Non-intervention into smaller units may often be appropriate, both to protect individuals’ autonomy, as required for their proper development, and to economize on 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 (Leo 1890, paras 36, 37; Pius XI 1931, para. 78).

Some of the weaknesses of this view are readily apparent: it rests on contested conceptions of the social order - as willed by God - and of the human good as a particular mode of human flourishing, again, as determined by a comprehensive and possibly contested moral view. It is thus easily subject to criticism that it cannot be applied among parties who fail to share these values. We return to this below.

One implication is that this account cannot settle beyond reasonable disagreement which sub-units and cleavages should be embedded - e.g. regarding families, or 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. that of families rather than the state (or the state rather than the European Union) regarding care for the infirm, wages, or support during unemployment. Such disagreements notwithstanding, deliberation might reduce these disagreements for purposes of reaching public consensus. And the parties might still be able to agree on certain basic needs, human rights etc that are less open to challenge.

Consider the concerns about different, incompatible conceptions of the good life. Koskenniemi noted against dismissing the state:

as long as there is no wide agreement on what constitutes the good life, the formality of statehood remains the best guarantee we have against the conquest of modernism’s liberal aspect by modernism’s authoritarian impulse.

(Koskenniemi 1991, 397, cited in Carozza fn 166)

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 – regardless of how decentralized. However, this is compatible with sub-units pooling certain powers to secure those objectives they deem in their or their citizens’ interest. Indeed, human rights treaties that limit state sovereignty may be more robust against criticism based on value pluralism. 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 Catholic Subsidiarity are shared by the Lisbon Treaty, for better and worse. The standards and objectives of the social order are to be taken as given – by God and his Church, or by the EU treaties and their guardian the Commission (Follesdal 2003), respectively. Disagreement about objectives or how to balance them are difficult to handle according to this conception of subsidiarity. On the other hand, this approach allows critical assessment of the legitimacy of particular states: The state must comply with natural and divine law to serve the common interest (John XXIII 1961, para. 20; Leo XIII 1891) – and in the EU case, all states must comply with the European Convention on Human Rights. 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 inter-state relations.

**e A Liberal Contractualist case for subsidiarity**

Finally, consider Liberal Contractualism of the kind associated with John Rawls, T.M. Scanlon or Brian Barry. Such a tradition may acknowledge a - limited - role 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. Such political influence secures and promotes two important interests. Agreeing with the republican claim of Confederalists, political power helps protects our interest in avoiding domination by others. In modern polities this risk is arguably reduced by a broad dispersion of procedural control in the form of universal suffrage. Such control over institutional change also helps us maintain our legitimate expectations, expressed as 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 thus 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 sub-units, there is a case for subsidiarity. However, this account does not single out Member States as the only relevant sub-units, contrary to Lisbon Subsidiarity.

The second argument for subsidiarity concerns its role in character formation. The Principle of Subsidiarity can foster and structure political argument 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 national parliaments an institutional role, Lisbon Subsidiarity may facilitate the socialisation 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 sub-units, the proper common goal, and the likely effects of sub-unit and centre-unit action.

However, I conclude that such liberal contractualist arguments underdetermine subsidiarity. That is: other rules for the exercise of political power could serve the same purpose, which is to ensure public argument about shared ends and suitable means, leading to preference adjustment. Furthermore, this argument must be supplemented by theories of institutional design in order to suggest suitable institutional reforms. Whether sub-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 and otherwise**

The five accounts of subsidiarity sketched above suggest several reasons to support quite different versions of subsidiarity, each with different weaknesses. In light of these brief sketches, we may conclude that Lisbon Subsidiarity seems to be a conception of subsidiarity with features that fit better with some of these five theories.

a) Sub-units are sometimes 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 sub-units.

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, 257, Manin 1987, 352).

d) Subsidiarity may help protect against subjection and domination by some others, by proscribing intervention into local affairs – except to protect vulnerable individuals and groups against ‘local’ majorities.

### 3. Lisbon Subsidiarity and State Centric Subsidiarity assessed

I agree with some proponents that conceptions of the Principle of Subsidiarity may offer a refreshing and helpful view on several aspects of international human rights law; and perhaps on the relationship between state sovereignty and international institutions in general. Thus, for the case of EU law,

Much of EU constitutional law has been taken up with the search for ways of resolving the tensions and balancing the interests of integration and differentiation, of harmonisation and diversity, of centralisation and localisation or devolution. The notion of subsidiarity can be seen as yet
another conceptual space in which this balance can be negotiated, as a language through which the ongoing debate is channelled (De Búrca 1999)

While generally favorable to this strategy, the centrality of states tends to create some challenges that are insufficiently addressed. I sketch below some issue areas where “the” Principle of Subsidiarity’ approach does seem to bring order, but where the particular conception of subsidiarity – State Centric Subsidiarity - renders the result suboptimal, and skews the ‘conceptual space.’ I submit that Lisbon Subsidiarity avoids some of these weaknesses, but only in part.

**State Centric Subsidiarity**

It is worth noting some specific features of the conception of subsidiarity in the Lisbon treaty which it partially shares with that alleged to inform public international law more generally. – features which share the weaknesses of some of the traditions covered.

Lisbon Subsidiarity is State Centric in at least two important senses, both of which are highly debatable:

1) **States as Masters of Treaties**

States remain dominant masters of treaties: They enjoy veto rights, and immunity except in areas explicitly agreed. Treaties only bind states that have agreed to do so, and states may make various reservations to these treaties, sometimes quite drastic, - as long as these reservations are not contrary to the object and purpose of the treaties (Vienna Convention on the Law of Treaties, Article 19). Due to this central role of state consent, threats to states’ power and their perceived interests are unlikely to emerge from treaties. Thus several authors lament the prominence and influence of states in public international law including human rights law, e.g. with regard to states’ broad discretion, and the lack of sanctions (Donnelly 2003). They take this as evidence of the illegitimate bargaining power of sovereign states and the priority of sovereignty over human rights. In contrast, the Lisbon Treaty avoids this weakness, if only in part, insofar as all (new) member states of the EU must satisfy the ‘Copenhagen Criteria’, including respect for human rights, and all member states have ratified the European Convention on Human Rights. However, these safeguards upon entry to the union may not be enough to prevent later human rights violations.

The presumption for state consent as a necessary requirement for legal obligations of states is surely open to normative questioning, especially with regard to states whose normative credentials are dubitable. States are recognized as sovereign largely in virtue of satisfying certain aspects of statehood as we know it, specified by international law – i.e. by states themselves - concerning population, territory and autonomy. It may thus not surprise that the normative grounds for these criteria are lacking: it is unclear why all states thus identified should enjoy such sovereign
immunity. Insofar as it is states that *de facto* control territories and populations, effective and sustainable compliance – i.e. problem solving - may require states’ consent. But state consent seems insufficient to determine whether the authority of an international institution is legitimate – in particular for dictatorships and other normatively worrisome states. Their consent does not suffice to grant the international institution normative legitimacy. Nor is it obvious that their protests invalidate ‘dynamic’ interpretations. This lack of ‘quality control’ of states is flawed in the same way as Althusian Subsidiarity: public international law may be suspected of being unprepared to specify which wannabe states *should* receive such standing. The state centric versions of subsidiarity seem to at a loss to defend this general presumption.

Mattias Kumm and others have argued that state consent has become less central in international law more generally, which is no longer firmly grounded in the specific consent of states and its interpretation and enforcement is no longer primarily left to states. Contemporary international law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms. (Kumm 2004)

State Centric Subsidiarity might lament such alleged developments toward a reduced role for state consent. I submit that this trend rather underscores a weakness of this conception of subsidiarity: its presumption for the centrality of states stand in need of more convincing defense. Whether these developments are consistent with subsidiarity or other proposed standards of normative legitimacy is in part a matter of which alternative legislative mechanisms that might replace state consent, and whether there are other, better ways to control such authority. Such controls over international institutions might include accountability mechanisms or constitutionalized guarantees and checks.

2) **Treaties favour the interests of states, not necessarily those of individuals**

The treaties agreed tend 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 end up benefitting individuals, especially when a sufficient number of the states are democratic, or otherwise responsive to the interests of their citizens. But arrangements that benefit individuals to the disadvantage of states can thus not be guaranteed or even expected, and such arrangements are not likely to give the interests of individuals sufficient weight against other interests of states or of their governments. Again, this weakness is avoided to some extent in the EU insofar as all member states are democracies. However, the ‘democratic deficit’ of the EU also entails that the executive of each state is insufficiently accountable to domestic electorates, and hence can pursue other interests somewhat unchecked at the EU
level (Follesdal and Hix 2006). The LT requirement that the EU should ratify the European Convention on Human Rights will reduce this risk.

Note again that less state centric conceptions of subsidiarity will question precisely whether international institutions should aim to promote the interests of states – or instead the interests of individuals, e.g. in the form of stronger human rights protections against the state. In these cases the challenge is thus not how to defend this ‘piercing of sovereignty’, but rather: how to control such international human rights authorities against abuse.

**State Centric Subsidiarity – further problems with regard to international human rights [To be expanded..]**

Several authors lament the prominence and influence of states in public international law including human rights law, e.g. with regard to states’ broad discretion, and the lack of sanctions (Donnelly 2003 ref). They take this as evidence of the illegitimate bargaining power of sovereign states and the priority of sovereignty over human rights. As a response, a principle of subsidiarity may seem promising (eg Carozza 2003, 63). Indeed, subsidiarity is alleged to render several other aspects of present public international law more palatable by normative standards of legitimacy – at least insofar as this particular principle of subsidiarity itself is justifiable.

The state centric conception of subsidiarity is under strain in at least two kinds of circumstances. Firstly, different member states may disagree about the objectives to be achieved – or about how to weigh or balance manifold objectives. In the case of the EU, these objectives include not only human rights, but also an internal market, social exclusion, cultural diversity and gender equality - to mention but four (cf LT Art3). It remains an open question whether EU action is always warranted, regardless of the different blends of such objectives. Secondly, even when there is agreement on objectives, some states may be willing and able to maintain higher regulatory standards – including human rights - than those proposed by the EU, so that it is unclear whether centralized action really does make for more effective achievement of the objectives. In both cases, it is the prominence of states that seem to create problems in applying subsidiarity.

**4 Subsidiarity and international human rights: a poor fit?**

What conclusions may we draw with regard to the relationship between plausible principles of subsidiarity, and present international human rights law – and the practices of the EU in particular?

As noted above, a central tension is between accounts of subsidiarity where *states* are central, and those where the interests of *individuals* are fundamental. These two engender quite different accounts of the legitimate functions of public international law. Individual-centered accounts will be more willing to endorse human rights courts and treaty bodies that protect and promote the interests of *individuals against* the actions and omissions of their own state – insofar as such
bodies do indeed add value to domestic courts etc. However, in many cases, including in the EU, human rights bodies serve several functions – which make the picture more complex. I also point to some problems with the current practice of the ECHR.

**What are the objectives and ultimate units of concern, of states’ human rights commitments?**

In the EU case, I suggest that the objectives of international human rights constraints on member states and on the EU are twofold: Firstly, to protect citizens of each state against abuse by their own government. But a second function is also important: Such constraints help protect citizens of each state against abuse by other EU member state governments, and by Union bodies – who now share decision making authority over them.

I submit that these dual functions affect the application of the Principle of Subsidiarity. The *objectives* are twofold, thus how they are best secured may require trade offs between them. There may be situations where the human rights treaty bodies are suboptimal for some member states in the EU in protecting against abuse by their *own* governments, but where the protection these bodies provide against violations by other governments and by Union bodies still provide sufficient justification for the human rights regimes. [– Complex consequential arguments may arguably serve to justify international human rights courts that apply to highly human rights respecting democracies and normatively more despicable autocracies alike. Even if they provide scant added protection to citizens of the former, their overall benefits to citizens of the latter may suffice to justify such courts and treaty bodies, especially if the benefits can only be secured if the former group of states also ratify.]

The present human rights protections secured by submission to such courts and treaty bodies may be difficult to square with State Centric Subsidiarity in general, which assumes with insufficient argument that states and their interests - however identified - should determine the scope of treaty body authority. The more plausible versions of subsidiarity canvassed above insist that ultimately, even the authority of states is justified on the basis that such powers benefit individual persons’ interests better than alternative institutional structures. The tension between these two conceptions may be smaller in the EU, for two reasons: a) the member states are democratic, which would tend to entail that the interests defined by the governments include protections of the citizens against abuse of government power; b) the member states have a ‘self interest’ in the human rights commitments of other state governments. These two points should lead us to conclude that Lisbon Subsidiarity should be less state centric, accepting more constraints on sovereignty for the sake of human rights. The result may then well be stricter requirements on states in good standing, and stronger monitoring and sanctioning bodies to protect and promote human rights.
Whose authority?

We see this acceptance of restrictions in sovereignty, arguably as a consequence of the twofold objectives of EU human rights regimes concerning who should be regarded as the ‘local’ actor who should *prima facie* have the claim to authority, according to the Principle of Subsidiarity. What is at stake is arguably not only one member states’ citizens’ human rights – but also other Union citizens and residents, who are potentially affected by majoritarian EU decisions. One implication is that no member state government and parliament can simply appeal to State Centric Subsidiarity to justify immunity against scrutiny, since the implications for other Union citizens and other denizens entail that the ‘natural’ body with *prima facie* authority is at the Union level.

Tension between Democracy, Subsidiarity and Human Rights

There are deep tensions between democracy, subsidiarity and human rights protection in the EU and elsewhere. Carozza strikes an optimistic note in claiming that his preferred conception of subsidiarity does seek to balance *both* the idea of noninterference *and* that of intervention or assistance. It therefore requires serious consideration of the ways that more local authorities may sometimes be less capable of ensuring the protection of human rights without external intervention or assistance. (Carozza 2003, 79)

While I agree that various Principles of Subsidiarity *seek* to so balance important values, a justified balance is not easily struck by appeals to a Principle of Subsidiarity alone. Consider the procedure to address suspicions that a member state engages in systematic violations of the Union’s values. This procedure is consistent with a certain conception of subsidiarity and democratic principles, but it also highlights the weaknesses of these principle and tensions among them:

It seems appropriate that international or Union efforts should firstly seek to enhance domestic mechanisms that will alleviate and prevent human rights violations. Such supportive measures by outsiders may include fact-finding, and reporting of facts and legal norms to domestic audiences who may have few other credible sources.

But *who* is to decide whether Union action is required? Subsidiarity arguments can only guide this in light of the *objectives* of human rights constraints. In the EU case, I have suggested that the most obvious objectives are twofold: To protect citizens of each state against abuse by their own government; - but also to protect citizens of each state against abuse by *other* EU member state governments – who now share decision making authority over them.

Presumably the alleged violator government will always hold that no outside action is needed – and thus, on a State Centric conception of subsidiarity, central action is illegitimate. While if the *ultimate* unit of concern is citizens of that state, or other persons living within its territories, action may still be required – as is also the case if those with a stake are citizens of other member states who will be subject to
votes by the offending state representatives. So there may be a case for a central court determining violations, even given the State Centric Subsidiarity expressed in Lisbon Subsidiarity – since the interests of (citizens of) other member states of the EU are at stake. (Note that this is how the ICC operates: it is the higher level which ultimately determines whether the lower level has proven unwilling or unable to carry out the decision-making (i.e. criminal prosecutions) at the lower level). Thus, the decisions are to be made by a qualified majority of member states (ref).

A second more striking feature of the procedure is that the LT only appears to allow limited responses to violations of human rights by a member state: A “serious and persistent breach” may only lead to the suspension of certain rights of the member state, including voting rights in the Council (Art 7). The LT does not allow – even as an ultimate recourse – exclusion from the EU, or humanitarian intervention into any member state on human rights grounds. This outcome of the intergovernmental bargain is surely not surprising for students of politics, and would seem quite consistent with a conception of subsidiarity which specifies states as the primary holder of authority. However, this lacuna is still remarkable from the point of normative political theory. This respect for member states’ sovereignty would seem unwarranted: One reason the EU was established was after all to prevent wars and massive human rights violations. Should it not be allowed to intervene in abusive member states, democratic or otherwise? In contrast, the African Union has the right to intervene in a member state in cases of war crimes, genocide and crimes against humanity (African Union 2000, Art 4).

In the EU, it would appear that the ultimate sanction against a member state is exclusion from the Union. Some critics would say that this shows an insufficient commitment to human rights, and an undue respect for member state sovereignty, grounded in an ill conceived conception of Subsidiarity. Others may question the benefits of a more permissive regime for interventions – even well-intentioned ones. Optimists may think that interventions will be counter productive, and instead that the threat of exclusion from the EU is a powerful enough deterrent.

A comprehensive assessment of the responses to human rights violations must, however, consider that a state that is found to have ‘seriously violated’ the ECHR may be excluded from the Council of Europe (Statute of the Council of Europe, Art 3 and 8). This may render them ineligible for membership in the EU – since all EU member states must also be member states of the Council of Europe [check legal basis; to be expanded, references etc - ]

A final point that merits mention with regard to the authority to determine human rights violations is how to ensure that central authorities are indeed well equipped to make such determinations: what mechanisms of selection and other forms of accountability can assure us that international human rights tribunals reliably protect the human rights of individuals? While some worries about the ‘democratic deficit’ of judicial review may be criticized (Waldron 2006, Bellamy 2007, Follesdal 2009), the case in favour of such institutions may depend on details of design which hitherto have received insufficient attention – reform proposals.
notwithstanding (Woolf 2005).

**The Margin of Appreciation**

Some final observations concern the current ECtHR practice of a ‘Margin of Appreciation’ which is alleged to be consonant with subsidiarity. The European Court of Human Rights grants the state a certain “margin of appreciation” in how to protect certain (though not all) human rights domestically. States are allowed some discretion in how to best secure the rights of their citizens. Similarly, a state enjoys some discretion when it is found in violation of the ECHR: the state is given some leeway in how to change domestic laws or practices in order to conform to the treaty obligations. Such practices of discretion might be defended on the basis of an assumption of subsidiarity: the national authorities are thought better placed than an international court to evaluate local needs and conditions (Fretté v. France (26/02/2002)). There seem to be a practice of the ECtHR to grant a wider margin where it discerns no common European standards or values that apply (cf. Handyside judgment 1976, Muller 1988 [against obscene paintings], Rees [on transsexuals], cf. Bernhardt 1994). On the other hand, the Margin of Appreciation is said to be smaller when the ECtHR detects a development toward a more broadly shared European standard due to harmonisation etc. Some thus observe that this margin seems to be shrinking (Arai-Takahashi 2001, 201).

One aspect of the current practice that does seem to fit with subsidiarity is the (alleged) policy of the court to be very respectful of national courts’ decisions that give evidence that the court has actually weighed conflicting rights against each other. – the ECtHR is more likely to overturn decisions where there is no such evidence [reference]. This may amount to a procedural check, so that the ECtHR ensures that national authorities have deliberated in good faith – in the spirit of subsidiarity.

Other aspects of the current practice are less convincingly justified by a principle of subsidiarity that is itself plausible. In particular, it is difficult to square the rationales for determining the *scope* of such a margin with arguments of subsidiarity. The reason for respecting national democratic decisions, that these authorities are more informed about the local peculiarities and stakes of decisions than a European court is likely to be, seems unable to justify the current practice as sketched above: Why should a more wide spread European standard *reduce* the appropriate scope of discretion to be enjoyed by those states who do not share such a standard? Critics may suspect that the ECtHR carefully picks its fights to maintain its own legitimacy. It may thus grant powerful states a greater margin of discretion than other states, or not challenge practices that are wide spread. Arguments in favour of the practice may be that a wide agreement among states – with a greater consensus among them - may indicate that particular practices were mistaken, also in the cases of laggards. However, we should then expect the ECtHR to explore the reasons for the shift in other states.

[To be expanded in light of our discussions]
Conclusion

[To be revised..] This paper has sought to argue that ‘the’ Principle of Subsidiarity cannot provide legitimacy or contribute to a defensible structuring of public international law, or human rights law, on its own. While in general agreement with those who counsel some role for subsidiarity considerations, this paper cautions that the debates require attention to more items than are sometimes noted. The Principle of Subsidiarity stands in need of substantial interpretation, which must be guided by normative considerations. While a Principle of Subsidiarity may prove a helpful ‘constitutional principle’ for international human rights law and other public international law, many crucial aspects require much further attention, in particular the standing of states, and their authority to determine whether human rights violations have occurred.

State Centric Subsidiarity has several weaknesses that seems to also inform international human rights. The Lisbon Treaty version of Subsidiarity avoids some of these problems by how it expresses and embeds its Principle of Subsidiarity:
- Only to member states that satisfy human rights standards
- new ‘yellow card’ procedure of parliamentary review of proposed EU legislation (Protocol, Art 8).

Other problems remain, including how to apply the Principle of Subsidiarity to mixed objectives, as arguably the European human rights regimes:
- Firstly, to protect citizens of each state against abuse by their own government.
- Secondly: to protect citizens of each state against abuse by other EU member state governments, and by Union bodies – who now share decision making authority over them.

Who should then decide whether intervention is appropriate?

I have suggested that ‘the’ Principle of Subsidiarity cannot on its own provide legitimacy or contribute to a defensible structuring of public international law, or human rights law. Appeals to subsidiarity are too vague, and require attention to more items - including
- the standing of states,
- whether centre action is prohibited or required
- who should decide these issues

The more plausible versions of subsidiarity insist that ultimately, these questions are answered in light of which arrangement benefit individual persons’ interests better than the alternatives: sovereign state consent is not an obvious part of the solution

References

Antwerpen, Intersentia