

THE LIMITS OF SUBSIDIARITY

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There are two principles of subsidiarity. The first is the constitutional principle of subsidiarity. This principle speaks to the delineation of public power within the state, what levels of democratic decision-making should be established by the constitution and which areas of decision-making should be allocated to those levels. Its most prominent expression is within European Law, and it is expressed as a formal principle of that legal order, but it has wider applicability. After all, questions of federalism and devolution are of universal application, and there should be some degree of regionalisation of public power in just about all states. The second, more ambitious, form of subsidiarity is found in Catholic social philosophy. This principle is of wider application and speaks to the relationships between larger and smaller social entities. The principle encompasses relationships within the public sphere, but also catches relationships between public and private entities; the Catholic principle speaks to the public/private divide as well as to the delineation of power within the public realm. As a matter of intellectual history, the constitutional principle is a descendant of the Catholic principle and is indebted to it. This article will argue, though, that the additional space occupied by the Catholic principle, its attempt to regulate the division between the public and private realm, is better dealt with by other constitutional principles, and subsidiarity should be confined to the allocation of public powers.

The Constitutional Principle of Subsidiarity

The constitutional principle of subsidiarity is an answer to the boundary question in political theory: that is, how we should determine the group of people who are entitled to make decisions about state policy. Democracies need a *demos*, a people, those who can vote in elections. But the boundaries of the *demos* cannot always be determined democratically: we need to know who is entitled to vote before creating institutions through which that entitlement is exercised. On occasion, the decision that is made about the boundaries of the democratic

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unit are crucial to the resolution of a decision by that unit. For instance, when there is pressure for secession within a state, the outcome of the debate may turn on whether this is a question for those who live in the region, or a question to be determined by the people of the whole state. The decision about which of these two groups gets to decide is not one that can be made democratically, this would presuppose the outcome of the dispute. The constitutional principle of subsidiarity addresses this issue, and, as such, it is a principle about democracy, rather than a democratic principle. Subsidiarity requires that democratic units be drawn such that those people who will be affected by decisions are able to participate in them, a modernised version of the old medieval maxim that what touches all should be approved of by all. But this idea of participation entails that the unit must work as a true democratic unit, it would be foolish and counterproductive to create a new democratic unit for every decision. The democratic forum that is created should be one with which people will engage, and through which they will engage with each other. There is, then, a limit to the number of such units that can exist within the state. Probably the maximum number of plausible democratic units a person can engage is about three or four, many more than this and the constitution risks apathy from its citizens, who find their public obligations over-taxing, and confusion, as they struggle to work out the responsibilities of each democratic level. The most obvious set of questions to which subsidiarity speaks is the delineation of public power within the state, to the level – national, federal, local – at which decisions should be made. Less obviously, it also speaks to two further questions.

First, subsidiarity speaks to the grand question of the allocation of sovereignty and the creation of the state itself. Subsidiarity tells us that states can be too big, when they become too large or too disparate to ground a democratic unit. Calls in the Nineteenth Century in the United Kingdom for a ‘Greater Britain’, with an Imperial Parliament consisting of representatives drawn from around the empire, ran contrary to the principle for these reasons. The British Empire was simply too large to ground a democratic unit, there were not enough political issues shared by people in, say, England and India or Canada and New Zealand, to justify these territories sharing a single legislature. Subsidiarity here weighed against the imperial project, showing it to be a form of injustice: the imperial territories were entitled to become separate, sovereign, states. On the other hand, states can also be too small, when their size means that they lack the ability to decide on their own affairs and are effectively under the control of another state or powerful private actors. Here, the injustice is twofold. The people within that over-small state are denied the ability to fully engage in the political realm through

democratic institutions, unable to effectively shape the direction of their state. But there can also be a sense in which they are shirking their responsibilities and unfairly burdening those in neighbouring states: sometimes they are relying on other polities to provide them with defence, advanced medical care, the infrastructure for the financial services that their community needs. Citizenship is a burden to be shouldered as well as a benefit to be conferred.

Second, subsidiarity speaks to the choice between devolution, federalism, and confederalism as constitutional forms. Devolution operates when a central authority hands a decision down to a regional authority whilst retaining the capacity to take back the power if it wishes. In a federal settlement, in contrast, it is the constitution that allocates power between the centre and regions, and the jurisdiction of each side is protected from the encroachments of the other. Finally, confederalism is the flip side of devolution: states hand decisions up to a supranational body, whilst retaining the capacity to pull back that power. Subsidiarity pushes for devolution, rather than federalism where the democratic body that is created or empowered requires the on-going supervision of another set of democratic institutions further up the constitutional chain. This may be the case where there are social factors that impair the operation of democracy within the unit – a deeply divided society like Northern Ireland, for example, might struggle within a federal structure – or where there are reasons to doubt the integrity or competence of the regional legislature. Subsidiarity pushes for federalism rather than devolution, in contrast, where this on-going supervision by bodies higher in the constitutional chain would be undesirable rather than desirable, and the regional legislature is more likely to prove a democratically effective decision-maker on that issue than the national body. Here, the risk of unjustified intervention by the national level in regional decisions justifies the limitation. Subsidiarity and the question of confederation tracks this discussion, and has taken its most pressing form in the context of the European Union. There are at least three possible forms the European Union could take, and subsidiarity speaks to the choice between those forms. First, we might conclude that the European Union should become a state, with the implication that this unit will now have the final say about subsidiarity and the delineation of public power within its territory; the Union would then resemble a federation, with power constitutionally divided between the centre and regions, and the Court of Justice of the European Union adjudicating on this delineation. Second, the European Union may have been given devolved powers from its constituent states, with those powers subject to democratic scrutiny within member state legislatures, and those states able to re-condition or remove this power at any time. Third, the European Union might occupy the same space as a

federal unit within the Member States. Its powers could be modified or removed by the state, but only at the cost of a domestic constitutional amendment. The European Union sometimes dreams of the first model, with the establishment of a truly federal Europe, but the Member States are generally supporters of either the second or third options. The democratic weaknesses of the European Union amply justify the Member States' caution.

The Catholic Principle

The Catholic principle of subsidiarity covers this ground, but also speaks to the tasks of collective associations more generally: encompassing, amongst other bodies, charities, trade unions, and families. The papal encyclicals expounding the principle present it as a bulwark against over-intrusive collective bodies, a principle that limits the proper bounds of collective activity. As Pope Pius XI wrote:

‘As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.’

Pope Pius XI, *Quadragesimo Anno*, (1931), para. 79.

Whilst the Catholic principle of subsidiarity often engages with questions about the boundaries of the state, it does not presuppose or require the existence of that institution. The Catholic principle of subsidiarity, if valid, would apply even if the state did not exist. Many writers, drawing on the encyclical, use the language of ‘priority’ to describe the relationship required by subsidiarity between the state and smaller groups. The claims of smaller groups

are ‘prior’ to those of larger entities; the demands of the family, for example, are ‘prior’ to the state. The idea of priority plays out in several ways in the literature.

Sometimes smaller groups are presented as empirically prior to larger groups. As a leading scholar on the Catholic principle, Professor Maria Cahill, writes, subsidiarity ‘starts with recognition of the existence of groups that emerge naturally in response to this irreducibly social dimension of human flourishing.’ This claim might be a version of an historical story of the origins of the state that presents it as emerging from the gradual expansion of other social institutions, growing from families, through villages and cities, into states. The smaller groups might then be thought to be ‘prior’ to the larger, in the sense that the larger units emerged out of them. More ambitiously, the claim might seek to divide social groups into two categories: the natural and the artificial. The former, natural groups, such as families, are the product of biological forces and are, in some sense, the inevitable consequence of our innate disposition towards sociability, whilst the latter, such as the state, are, in some sense, the products of reason, built by thought and deliberation. A third possible reading might take subsidiarity as claiming that the authority of the state – and of larger units in general – is constructed out of the authority of these smaller groups: larger units are formed out of, and remain reliant upon, the smaller. These three empirical claims, three glosses on the meaning of priority, are compatible, and it could be that the Catholic principle of subsidiarity embraces each of them.

A normative claim is then combined with these descriptive assertions: smaller, ‘natural’ groups, are ‘prior’ in that they should be accorded, or recognized as possessing, priority over larger groups. According to Cahill, the state should only intervene when these smaller units request intervention or are manifestly incapable of functioning. The larger units are, in this sense, subsidiary to the smaller bodies they exist to support. Professor John Finnis puts the argument even more strongly, contending that the state should ‘never’ take over the formation, direction, or management of these bodies. As interpreted by Cahill and Finnis, the Catholic principle seeks to establish a near categorical divide between the state and private groups, and to limit the state’s intervention in the operation of private groups and to all but exclude its role in their construction. Though there is a great deal to be learned from the Catholic principle and the scholarship that surrounds it, when developed in this way the principle becomes empirically problematic and normatively unattractive.

First, the contrast between natural, or organic, social groups and other forms of social group is a false one. Social groups are constructed through rules, some of which are set by the communities in which those groups exist, some of which are chosen by the participants in the group. In societies governed by law, all social groups are partly conditioned by legal rules, in that the law provides a background set of rules within which those groups operate, and many social groups are also partly constituted by legal rules, in that there are laws which relate directly to the establishment and operation of the group. For example, the family is both conditioned by legal rules – criminal law sets limits to the ways participants can engage with each other – and its constitution is shaped by legal rules to a degree – the obligations of parents towards their children, for instance, are partly determined by law. The private institution of the family is in this respect no different from public institutions. In each case, the group is constituted by a mix of legal and social rules, rules that are more or less consciously chosen by the communities in which they exist and those who participate within them.

Supporters of a distinction between natural and artificial groups might reply that the division is not intended to bring forward their manner of composition, but, rather, their mode of origin: perhaps natural groups are the products of human nature, whilst artificial groups are the product of human ingenuity. But, if this is the claim, it would rely on a divide between biology and reasoned action that is hard to defend. Reasoned action, action based on decisions that have been considered before being adopted, is grounded in our physiology just as much as instinctive action. And, indeed, in actual decision-making the two are mixed: reasoned action is animated and shaped by instinct. All social groups are formed from a mixture of instinct and reason, and all are, ultimately, grounded in human nature: the state may be more complicated than the family, but it is just as much a product of our nature.

These doubts carry over to the supposed moral priority of smaller groups. It is undeniable that different groups can and do make contradictory moral claims on individuals. Sometimes it may be possible to expose one set as mistaken, and there will be a morally correct answer to be found. But even if this is not the case, it seems unlikely the rival moral claims of a smaller group should always be accorded priority over the larger, irrespective of the content of that claim. It is easy to conjure fictional examples of clashes between, say, family and state obligations in which the impact on the family would be trivial, and the impact on the state would be significant. Here, our obligations towards the state are more pressing, and it would be a (moral) mistake to give priority to our family.

Furthermore, as Professor Alan Bogg has argued, the constraints that some forms of the Catholic principle place on the state are hard to justify. Bogg examines with some care Finnis' claim that the state should 'never' take over the formation, direction, or management, of what he, Finnis, terms 'non-instrumental' associations, like the family, and should 'only exceptionally' play this task with instrumental associations, like trade unions and businesses. As Bogg shows, Finnis' account is only attractive if we understand the qualification of 'formation, direction, or management' narrowly, as amounting to little more than an insistence on the value of people being able to form and operate associations freely. Building on this critique, contrary to the claims of some writers on subsidiarity, one of the purposes of the state is to cure some of the problems caused by the existence of private groups and, by so doing, to protect the moral justifiability of these bodies.

Many private groups are characterised by a sort of moral blindness, with some of the reasons that would normally apply to the deliberation of their members ignored within group reasoning. So, for example, in families, parents care more for their children than for those outside of their family, whilst in the corporate world businesses are happy to make profit at the expense of their competitors. These private groups are successful, in part, because they require their members to narrow their range of moral deliberation, focusing on their members and on the achievement of the group's objectives. The broader interests and objectives of those who are part of the wider community in which the group operates are ignored. Because of this restriction, the immediate objectives of these private groups differ from those of the state, but, in the longer term, the operation of these groups can support, and can even be essential for, the successful functioning of the state. So, a community in which children are raised within families provides them with better care and support than they would experience if raised by the state directly, free markets function better than command economies at generating and supplying resources to the state's people. States need these private groups if they, the states, are to flourish, and these private groups can only operate successfully because of their narrowed reach of concern. The argument also flows the other way: private groups need the state to justify their functioning. The state, considering the overall good of its people, checks that the moral myopia of the private realm is defensible by ensuring that the actions of discrete private groups combine to advance the common wellbeing. It does this in a host of ways. For example, the state provides the background in which these groups can operate successfully, building an effective legal system and by ensuring that people have the capacities, in terms of education

and health to participate in these groups effectively. It checks that the templates of these groups are optimal for their purposes, perhaps by limiting the range of the group's choices (families can decide how to educate their children, but not whether their children should be educated) or by regulating the way in which the group makes decisions (determining, for example, the rights of shareholders or partners in a firm). Finally, the state steps in to protect those who lose out in these systems. It ensures that children who lack a family receive care, it provides a welfare net for those who fail in the competition of the marketplace, ensuring that the free market does not lead some to destitution. Given this, members of private groups know that those outside of their limited range of concern will not be abandoned by the community. In short, it is the existence of the state, and its regulation of these private groups, that renders their narrowed scope of attention justifiable: states need private groups, but private groups also need the state.

When the state is functioning well most of those within the private groups inside of the state are also citizens. In their private roles they take on the moral myopia necessary for the operation of private groups, whilst in their public roles as citizens they ensure that this moral myopia is defensible. The principle of subsidiarity, with its tendency towards the categorical division of powers and, in some forms, its attempt to radically limit the engagement of the public with the private, is unable to capture the richness and complexity of this interaction. Elsewhere, I have argued that the principle of civil society, drawn from a different intellectual tradition, provides us with a better framework through which to examine these issues. Civil society starts from the premise that the public realm and private realm occupy a symbiotic relationship rather than attempting to draw a categorical divide between the two. Subsidiarity should, then, be confined to its constitutional form, in which its tendency to delineation is a strength rather than a weakness.