SITUATING SUBSIDIARITY

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Subsidiarity is a principle about the ordering of relations between groups. It has a foothold in legal doctrine, most notably in the law of the European Union, but increasingly also in international human rights law. But subsidiarity is at its heart a moral principle about how state and society (and perhaps states and societies plural) should be structured. While its precise content and implications in a range of contexts are certainly contested, at its core the principle requires higher (larger) groups to aid lower (smaller) groups, rather than to obliterate or subsume them. The principle thus recognises the value of a plurality of social groups, of multiple associations in which a measure of self-government is possible.

The articles in this issue reflect on the idea of subsidiarity and its implications for legal and political thought. The articles are drawn from a series of seminars we convened in the University of Oxford, which considered subsidiarity from a range of differing perspectives and in a wide range of contexts. Some considered the origin and content of the principle, especially in moral thought, while others attended to its application in constitutional law, in international law, and in labour law. In the course of this consideration, many of the contributors also examined the principle's uncertain relationship to other central constitutional ideas, especially sovereignty and federalism.

Perhaps the principle's most obvious implications are for constitutional ordering within particular states. Nicholas Aroney's article considers some of these implications by thinking about federal ordering from the ground up, arguing that a federal form of government is an institutional reflection of a federally constituted (political) community – and arguing further that all decent communities are federally ordered in this non-institutional way. The foundation of his argument is a reflection on the human condition, on the ongoing tension between local and universal attachments and on the general (but not absolute) superiority of the former, at least in the sense that the latter ought not to obliterate the former. The state is an association, Aroney maintains, that is forged by the coming together of local communities, a process that is most clearly seen in 'aggregative' federations – those states

that are created from the coming together of other states - but which also illuminates other forms of political ordering. The recognition of local allegiances and identities, and the constitutional accommodation of demands for a measure of local autonomy, are the engines of federal ordering as well as of analogous arrangements such as devolution. Federal forms of government create a new whole out of many parts in ways that – if the principle of subsidiarity is adhered to – are intended not to subsume the parts. Aroney explores the variety of ways in which communities come together and comments on the significance of the particular mode of aggregation for the further life of the whole, illuminating his point in relation to the origins of the European Union, Australian Commonwealth and United States. Thus, Aroney develops an argument for the value of federal constitutional structures by way of an account of the nature of human society, which is rightly complex and multipolar.

Sometimes discussion of the responsibilities of constitutional units, in particular the relationship between regional and national units, starts by assuming the immutability of the boundaries of the larger entity: the boundaries of the state are treated as a given. David Miller notes that whilst the application of subsidiarity sometimes presupposes a prior ordering of peoples into states, such boundaries are often contested. He aims to articulate a kind of prolegomenon to subsidiarity within the state, outlining the considerations that bear on the question of where its boundaries should be drawn and thus on the relevant shape of the groups within which subsidiarity is to do its work. It could be that we should think of subsidiarity as concerned both with the question of how power is divided within an existing polity and, relatedly, the size and type of polities we should want to create. Either way, the principles that govern how one settles the boundaries of the political community are closely relevant to subsidiarity.

In thinking about how states should be delineated from one another, Miller explores three types of consideration. The first is *functional*, which requires that any state be capable of discharging the duties of a state – including managing its economy and protecting the basic rights of its members – without imposing unreasonable costs on others. This is a threshold consideration, which rules out various groups as contenders for statehood but does not settle the remaining array of open alternatives. More promising in this regard is the *political* consideration, which refers to the legitimacy of the resulting group, to its identity as a group that exercises the capacity for self-government and, especially, its capacity to be democratically legitimate. Here, questions of group identity and inter-personal trust loom

large. But the existence of minorities, especially those that have a well-grounded fear of and alienation from the majority groups in which they find themselves, complicates the analysis. The third consideration Miller terms *territorial*, which concerns claims to some particular land, claims that he points out are morally relevant to the question of boundaries even if they are often the cause of instability and/or are in tension with the claims of others.

These considerations should inform how boundaries are drawn for they inform the proper delineation – or recognition – of groups that should exercise a measure of self-government. The operation of subsidiarity within a state may often require the regionalisation of power – the creation of federal or devolved institutions – but will sometimes demand more creative thinking, with states allocating powers to groups who are defined by a shared aspect of their identity rather than a shared territory. Subsidiarity requires one attend to the realities of group life: even when it comes to the division of public power within the state, we should be aware of the presence of (private) groups and their likely impact on the quality of democratic decision-making. Miller argues that the complexity of the interplay amongst the functional, political and territorial considerations confirms the inadequacies of the nation-state as a universal model, and demonstrates the need for alternatives in some cases, including devolution, joint exercise of authority by adjacent states or consociational forms of government. This sharing of powers or blurring of sovereign state capacity he concludes may be necessary to manage tensions. And the ongoing prospect of such tensions rather confirms the need to displace international law's axiom that boundaries should be regarded as settled.

Questions of international law receive close attention in other papers too. For subsidiarity would seem relevant not just to ordering within the state, or even between states, but also to the relationships between particular states, and between states and international institutions. The proper role of international bodies is considered by both Samantha Besson and Paolo Carozza. Each argues that subsidiarity demands a fine balance: international bodies must support states without encroaching on their rightful sphere of autonomous action.

For Carozza, the current structure of international law and the international community raise profound problems for the realisation of the principle of subsidiarity. International law is normatively and institutionally fragmented, not least because of the continuing centrality of state sovereignty in the international legal system. The principle of

subsidiarity standardly calls for recognition of the autonomy of lower groups, which are to be aided and overseen but not overtaken or obliterated by some higher group that is capable of such oversight. Carozza argues that subsidiarity thus requires a normatively coherent higher order group which is able to hold the good of lower order groups in view, and it this that international law lacks. Relatedly, he notes that in the international community at large, states and sub-state communities are sometimes profoundly weak and incapable, with the implication that the conditions may not yet be in place to warrant respect for lower groups – the right kinds of group do not exist. In short, he argues that neither the higher nor lower bodies are properly constituted for subsidiarity to have the purchase it ought to have. This argument might thus entail a need to transform both the international domain *and* the capacities of state and sub-state groups.

Besson's focus is narrower. She considers a special case of international law – international human rights law – where she argues the structures necessary for the establishment of subsidiarity do exist. Indeed, her discussion of the law surrounding the European Convention of Human Rights may perhaps illustrate what might be achieved by subsidiarity. For Besson, international human rights law is subsidiary to national protection. It is for national constitutional orders to play the primary role in the protection of the rights of people, but international human rights law complements its domestic counterpart, reviewing the decisions of state institutions to ensure that these bodies adequately protect the rights of individuals – and, as a function of this, the operation of the state's democratic processes. Thus, implicitly and increasingly explicitly, subsidiarity plays a pivotal role in disciplining and directing international human rights law through its relationship with national institutions.

The international dimension of this inquiry makes clear the importance of the relationship between sovereignty and subsidiarity. Carozza maintains that state sovereignty is in tension with subsidiarity and that the international law system fails to be a coherent, unified polity within which subsidiarity could take its place. Maria Cahill's paper also explores some of the tensions between subsidiarity and classical understandings of sovereignty. She contrasts the idea of authority outlined in the works of the early modern theorists of sovereignty (especially Hobbes and Bodin) with the idea of authority presupposed in subsidiarity, and the larger tradition in which that principle was first articulated and explored. In Cahill's view, classical sovereignty takes authority to be unitary, to be

addressed to individuals, to be an abstract construction, to be super-ordinate and to be impervious to the good. The image of Leviathan, forged out of the unity of wills of individuals and wielding the sword as the sovereign dictates and however he dictates, captures the point. By contrast, Cahill argues, the idea of authority presupposed by subsidiarity is addressed to groups, is organic (recognising a range of groups as natural rather than artificial and recognising also the good of their ongoing self-government), is supplemental, and is oriented to the good. This series of contrasts helps clarify the difference that subsidiarity makes and the importance of conceiving of political authority not only as a relationship between citizen (part) and state (whole) but as a series of relationships in which intermediary groups rightly feature.

Cahill and Carozza are pessimistic about the reconciliation of subsidiarity and sovereignty but they are not fatalistic. Indeed, their papers each suggest that sovereignty understood as a capacity for a group's self-government, including in peaceful association with other such groups in the international realm, has its proper place in our thought. What is objectionable is sovereignty understood as Leviathan, as destroyer of intermediary groups and loyalties and as indifferent to the good of those persons over whom it rules. Subsidiarity may bear on where sovereignty should be located within political communities, with relationships above this level (so to speak) the province of international law and politics and below the province of constitutional law and politics. Thus, the location of state sovereignty, and the relations amongst groups this would engender, would rightly be a question to be answered partly by reflection on subsidiarity. The considerations outlined in Miller's paper are relevant here, for they go to the question of which groups should be recognised and what capacities should they take up or be vested with. True, as Carozza and Miller both recognise, state boundaries cannot and should not lightly be redrawn, for this risks discord. Still, thinking further about the relationships between subsidiarity and sovereignty – both the antitheses and the points of complementarity – may prove fruitful.

What does subsidiarity require? At a minimum, that higher order groups and institutions value lower order groups, that they strive to help them to live well and to serve their members well without usurping their local self-government or bypassing them altogether. Developing some lines of argument from his earlier work, in conversation with contemporary legal theorists and past greats (notably Maitland), John Finnis aims to articulate more closely the value of subsidiarity and the demands it makes. Finnis identifies

subsidiarity squarely as a moral principle, a principle of justice, of which legal instantiations are only ever a pale reflection. For Finnis, subsidiarity rests on an appreciation of the place and value of human associations. These do not exist – or, perhaps, do not normally exist – to succeed at an institutional level but, rather, exist to help those within the organisation to flourish within its structures. Smaller groups allow individuals greater control over the direction of the association; in such organisations the individual is not merely a 'cog in big wheels turned by others' but is able to decide, or help decide, on the goals of the organisation and the methods of achieving these ends. Subsidiarity, by insisting on the worth of smaller associations, protects people's capacity to choose and pursue valuable activities within groups: individuals are more likely to be able to exercise control within smaller units than larger ones, and this capacity for control is morally valuable. Indeed, this benefit is such that it justifies a certain amount of inefficiency. Even if the activity would have been more effectively run by a state body, it will often be unjust to wrest control from the association's members. Subsidiarity is not reducible to a simple test of comparative efficiency because the exercise of local self-government is, in itself, sufficiently valuable to justify tolerance of some inefficiency.

Much of the scholarly discussion about subsidiarity is framed in terms of resisting government usurpation or dominance of intermediary groups, whether families, churches, clubs, trade unions, or businesses. However, perhaps this is too narrow a frame. Exploring the relevance of subsidiarity in relation to labour law in particular, Alan Bogg's article builds on John Finnis's work to question, against Finnis, whether a prohibition on taking over other groups is the best way to conceive of subsidiarity's demands. This more limited idea is, he argues, captured in part by way of freedom of association, which has its rightful place in our thinking and has been put to good use in litigation about labour law. But Bogg maintains that much would be lost if the principle of subsidiarity were taken to reduce to freedom of association. There is a perfectionist dimension to thought about subsidiarity, the value of which is apparent in studying the development of labour law over time. The main danger the state now poses to trade unions, he concludes, is not usurpation but indifference, and subsidiarity should be seen to be an alternative to both, one that may require state action to support and encourage underdeveloped or otherwise problematic groups.

The range of contexts in which subsidiarity falls to be considered would seem to confirm the point made in several of the papers that the demands of subsidiarity may differ

depending on the relative richness or poverty of the social world in question. Where there are flourishing groups, capable of uniting persons in reasonable joint action, then the imperative for higher groups may be precisely to do no harm and to avoid failing to perceive the goods that these groups do or trampling on them in the name of efficiency. But in other settings there may be a paucity of such groups and in this context subsidiarity may require that such groups as exist be developed and supported, and that new groups be elicited or even created. The hollowing out of the public realm, with the demise of many robust intermediary groups, may be partly a failure to respect the demands of subsidiarity, but the remedy may require not simply restraint but action – although who should act (citizens, officials…) may be unclear. The complexity of subsidiarity's application relates in part to the nature of groups, which vary widely in form and end, and which are more or less natural or artificial. Working out quite who should have responsibility for some type of group and how it should be treated by others will turn not only on the principle of subsidiarity in general but also on the particular nature and value of the type of group in question.

This line of thought raises a question, considered by Finnis and Bogg amongst others, as to whether the principle of subsidiarity is defeasible. It may be that respect for group autonomy should be set aside when the group in question misfires or when some other end requires concerted action on the part of the higher group. But whether this is the setting aside of the principle in the face of other considerations or the principle's built-in sensitivity to the ends of other groups and the capacities of the group in question is unclear. Either way, there will be times in which higher order groups certainly should overrule lower, even in ways that are not consistent with the continuing autonomy of that group.

Two further questions arise at this point. The first concerns subsidiarity's relevance to the position of individuals, that is, the persons for whom all associations, higher or lower, exist. It may be difficult at times to square subsidiarity's concern to protect the capacities and freedom of intermediary groups with the freedom of action of individual persons. Without doubt, there is a tyrannical edge (more than an edge!) to Leviathan's claims, but it is true that owing direct allegiance to the state may also be liberating. The citizen's entitlements (and duties) vis-à-vis the political community as a whole is a powerful shield against abuses from intermediary groups. The second question, again related, is whether and how subsidiarity applies all the way down, so to speak. One objection to state sovereignty, considered by Carozza, is that states may benefit from subsidiarity in relation to international

institutions and yet may not extend this benefit to sub-state groups. Should higher order groups require of lower order groups respect for subsidiarity in their turn? Perhaps the principle cuts both ways here: the well-ordered group will perceive and adopt the principle for itself as for others, but the judgment about what subsidiarity demands is for the group to make.

There are reasons for caution before concluding that a group flouts subsidiarity's demands. The Catholic Church, for example, has had a leading role in articulating and promoting the principle but is sometimes accused of flouting the principle by insisting on doctrinal unity across the Church, rather than permitting dioceses or parishes to settle such matters for themselves. The criticism is unfair to the extent that it fails to perceive the group's ends and the way in which unity on doctrine stands to those ends. Subsidiarity does not just require that such groups be able to make decisions on collective action, it also requires that they be able to make decisions about *how to make* those decisions. It is not straightforward to determine which group, or which groups nested within other groups, ought to make some decision. In the context of religious groups, it is for the group to decide matters of faith and – additionally or alternatively – to decide the extent to which its mission requires unity or permits subgroups to reach different decisions about these questions. The application of subsidiarity turns in part on the ends sought and the facts about how the members of the group understand their shared membership: there may be some decisions (say, about the law of homicide) that members of a group (the whole country) wish to make as a group rather than to leave to sub-groups (regions) to decide. There is thus interplay here between group identity, the ends sought by various groups, and subsidiarity.

One misunderstands subsidiarity if it is reduced to efficiency alone. And one risk of introducing the principle of subsidiarity into positive law is that this may replicate just such a misunderstanding (or some other). Finnis notes in his article that this is exactly what has taken place in European Law. There may be good reasons, all else equal, to welcome subsidiarity's formal recognition in legal doctrine, but not if the principle is misunderstood or, perhaps relatedly, if the purpose of its introduction is primarily to lend a patina of respectability to an arrangement that in fact regularly overwhelms subsidiary groups. But these problems aside, should one welcome subsidiarity's incorporation into law as such? Since its introduction in the Maastricht Treaty in 1992, the principle of subsidiarity within European Law has not proved effective as a principle which is invoked by litigants and

applied by the courts. Judges appear reluctant to make use of subsidiarity directly – and, given the complicated factual and political questions that the principle raises, perhaps they are right to be cautious. Like other sound constitutional principles, such as the rule of law or the separation of powers, it may be that subsidiarity does not have the form to be fit for adjudication but should instead inform constitutional argument less directly. The discussion above, and the range of arguments one sees in the articles in this issue, will bear on this question.

Whether it is fit for adjudication or not, subsidiarity may ground other legal rules or principles. The close relationship between federalism and subsidiarity considered in Aroney's paper confirms the point. Likewise, Besson in her paper traces various ways in which subsidiarity may be realised within a broader corpus of particular legal rules, in a way that may be superior to the principle's simple incorporation. Besson discerns three ways in which subsidiarity may be realised. The first is *procedural* subsidiarity in which an applicant to an international human rights court is required first exhaust her domestic remedies, such that the court reviews an antecedent national decision rather than taking the initial action in question. The second is *substantive* subsidiarity, in which the international court should defer to the national body's findings of fact or law to the extent it is better placed to make them and should leave to national authorities the choice amongst a range of reasonable alternative actions – a mode of defence embodied especially in the idea of the margin of appreciation. Finally, there is *remedial* subsidiarity, in which the international court leaves to the state the decision about how to respond to an adverse ruling.

Incorporating subsidiarity into legal practice may require such a piecemeal strategy, attentive to the peculiarities of the relevant context. Aroney's discussion of federalism, Besson's and Carozza's analysis of international law, and Bogg's study of labour law outline some of the considerations that bear on subsidiarity's reception into particular bodies of law. However, whether subsidiarity should be received in law, in whole or in part, is perhaps still an open question. It may be that the principle has, and should have, its main force in framing the open reasoning and choice of citizens and statesmen. The prospect of subsidiarity truly informing public deliberation and action may be aided by making legal provision for political structures of control. Reporting requirements may put subsidiarity on the agenda: for example, the European Commission is required to produce memoranda on legislative proposals, examining their reconciliation with subsidiarity. At the very least, this compels

the authors of the proposal to think about, and publicly justify, their actions. Perhaps more importantly, national parliaments have been accorded a limited power to delay – and, in the future, perhaps veto – legislative proposals that do not square with the principle. This measure is particularly attractive as it accords the institutions with the most interest in upholding subsidiarity the power to do so. These political structures may sometimes require judicial support, but the institutional problems created when judges are asked to apply the principle directly are avoided, or at least mitigated.

It is a sign of relative health in the body politic that the principle of subsidiarity enjoys wide respect and is taken seriously in legal and political thought, although this is of course undercut to the extent that the principle is misunderstood or misrepresented. Why does subsidiarity enjoy this standing in our public life? The arguments for its good sense canvassed throughout this issue may help answer the question. Cahill's article answers it more directly still, maintaining that there is an unfortunate connection between political liberalism and classical sovereignty, with their shared stress on the unmediated relationship between individual and state and on indifference, or antipathy, to the good – to the complex of morally significant values that give point to (and in good measure depend upon) the free choices of individuals and groups. The significance of this connection is that the inadequacy of some forms of liberalism, and their inability to ground a stable, just political order, helps make subsidiarity's merits clear. Importantly, however, on this view these merits turn on subsidiarity's nesting in a wider, deeper tradition of moral and political thought. This is a view that underpins many, but perhaps not all, of the articles in this collection. Evaluating this requires one to reflect on how subsidiarity should be situated in relation to other moral principles, an evaluation that we hope this collection of articles helps in part to inform. In this way, reasoning about subsidiarity is a way into reflection not only about the principles that govern the structure of state and society but also about the shape of sound political and legal theory more generally.